



Getting Away with Murder:  
The Forty Year Jurisdictional Gap Over DoD Civilians Stationed  
Overseas and the Military Extraterritorial Jurisdiction Act of 2000.

By

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## I. INTRODUCTION

Milton Gatlin began having sexual intercourse with his 13-year-old stepdaughter in 1996. The girl became pregnant, gave birth to a baby of her own, and paternity tests confirmed that her stepfather was the baby's father. This should have been a slam dunk case of engaging in sexual acts with a minor, but Milton Gatlin's conviction was overturned by the Second Circuit Court of Appeals.<sup>1</sup> It was reversed because Gatlin had the good fortune to have committed the offense while accompanying his wife, an Army sergeant, to Germany. The court held that U.S. criminal laws did not apply to overseas military installations, and thus the court had no jurisdiction to prosecute Gatlin.

The need for jurisdiction over civilians accompanying the military forces overseas has never been greater. Civilian employees and contractors are playing an increasingly important role in military operations overseas. The ability of family members to see the world as they accompany the Armed Forces overseas is one of the unique perks of military life. However, civilians who accompany our armed forces overseas have the potential to create significant problems for the military, and the nation in general, if they become involved in criminal activity. Crimes committed by Department of Defense (DoD) civilians overseas can undermine the good order and discipline of the overseas forces, and even to create international incidents.<sup>2</sup>

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<sup>1</sup> *United States v. Gatlin*, 216 F.3d 207 (2<sup>nd</sup> Cir. 2000). See *infra* notes XXXX and accompanying text for a full discussion of the *Gatlin* decision.

<sup>2</sup> Nearly fifty years ago, Justice Clark made the following observation:

A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit. At best, the detection and prosecution of crime is a difficult and time-consuming business, and we have grave doubts that, in faraway lands, the foreign governments will help the cause of a military commander by investigating the seller or user of habit-forming drugs, or assist him in deterring American civilians from stealing from their compatriots, or their Government, or from misusing its property. *Reid v. Covert*, 354 U.S. 1, 84 (1957) (quoting *United States v. Burney*, 6 U.S.C.M.A. 776, 800, 21 C.M.R. 98, 122 (1956)).

Unfortunately, there has not been an effective method to bring these individuals to justice. In the past, the military was able to deal with these crimes directly by exercising court-martial jurisdiction over DoD civilians who commit crimes overseas. However, a series of Supreme Court decisions in the 1950's held that court-martial jurisdiction over civilians in times of peace was unconstitutional because courts-martial did not offer sufficient due process to a civilian defendant. These rulings created a situation where there was virtually no U.S. jurisdiction over DoD civilians overseas, and any prosecution of such crimes was left to the various justice systems of the host nations.<sup>3</sup>

This lack of jurisdiction created a whole new set of problems. Often the host nation had no interest in pursuing the case, or was unable to prosecute, and the crime went completely unpunished. In other situations the host nations had such severe punishments that the U.S. did not want its citizens to be subject to host nation jurisdiction. Many host nations also lacked the due process afforded by a court-martial, and certainly not the constitutional guarantees that the Supreme Court's decisions indicated they intended the defendant to receive.

The jurisdictional gap was highlighted to Congress by the case of *United States v. Gatlin*. The fact that a military spouse who impregnated his 13 year-old stepdaughter would go unpunished because the crime was committed on an overseas military installation was shocking. This case finally spurred Congress to pass legislation in an attempt to close the gap that has existed for over forty years.

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<sup>3</sup> There are a few federal criminal statutes that have express extraterritorial application. See e.g., 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 1837 (economic espionage); 18 U.S.C. § 2332 (terrorism); 18 U.S.C. § 2401 (war crimes).

Congress' response came in the form of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>4</sup> The MEJA follows in the footsteps of a long line of attempts by Congress to re-create domestic control over Department of Defense (DoD) civilians when they are overseas. It reasserts domestic jurisdiction over these crimes, and thus addresses many of the concerns regarding the jurisdictional gap.

There are, however, some areas in which the MEJA will face difficulty in its ability to extend domestic jurisdiction to overseas DoD civilians. The problems that the MEJA is likely to face occur at the ends of the spectrum of the severity of offenses. At the top of the spectrum are the offenses where domestic federal law authorizes the death penalty for the offense. This issue relates to the interplay between requests for the removal of MEJA defendants from a host country and the various human rights treaties that are in effect. Many foreign nations are reluctant to surrender suspects for prosecutions where there is the potential of the death penalty being imposed.

This issue will need to be addressed by the U.S. any time there is a charge where federal law allows capital punishment for the charged offense. Most of the prosecutions under the MEJA are likely to arise from crimes committed in nations that are parties to human rights treaties abolishing the death penalty, because a majority of the overseas DoD civilians live in those countries. It is likely that the removal of defendants accused of the most serious crimes from these countries will be complicated, if not impossible, as long as the death penalty remains an option under the MEJA.

At the other end of the spectrum of severity of offenses lies the single biggest limitation to the effectiveness of the MEJA: the significant administrative difficulty in putting the prosecution's case together when all of the evidence and witnesses are in a

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<sup>4</sup> 18 U.S.C. §§ 3261-3267 (2000).



foreign country. The difficulty and expense of bringing a case under the MEJA will likely limit its application to only serious cases. There is very little that can be done to reduce those costs or to make prosecution of petty offenses in federal courts a viable option under the MEJA. However, the potential exists to reassert limited court-martial jurisdiction to overseas DoD civilians.

Exerting court-martial jurisdiction, but limiting the possible sentences to six months of confinement would not violate the constitutional principles that the Supreme Court was concerned about in the series of decisions that eliminated court-martial jurisdiction over civilians. Limited court-martial jurisdiction would close the jurisdictional gap for petty offenses, and allow prosecutions under the MEJA to focus on serious offenses where its inefficiencies are not a limiting factor.

Historically, the U.S. exercised jurisdiction over DoD civilians through the Articles of War and the Uniform Code of Military Justice (UCMJ). The Supreme Court decided a series of cases that eliminated that jurisdiction and created the jurisdictional gap. The jurisdictional gap resulted in many serious offenses going unpunished, and there has been a need to reassert jurisdiction. Congress passed the MEJA in an attempt to close the jurisdictional gap. With strategic amendments to the act, and aggressive implementing regulations, the MEJA will allow many of the crimes committed by DoD civilians overseas to be brought to trial in a federal civilian court. The addition of limited court-martial jurisdiction would fully close the jurisdictional gap, and ensure that the United States has the ability to take action against crimes that disrupt the good order and discipline of our overseas troops or that pose a danger to international relations.

## II. A HISTORY OF ATTEMPTS TO EXERT DOMESTIC JURISDICTION OVER DEPARTMENT OF DEFENSE CIVILIANS OVERSEAS.

The need for an effective mechanism to enforce the rule of law on DoD civilians existed for as long as civilians have been stationed with the military forces.<sup>5</sup> This need only increased as civilians began to routinely accompany the troops overseas, because their overseas presence has the potential to impact international relations as well as the military. In today's military, civilian employees of the DoD are stationed overseas in much the same way as their military counterparts. Civilian contractors provide a multitude of services to the overseas military members. Last, but certainly not least, many families accompany military service members during their overseas assignments.

The number of civilians who are stationed overseas with the military has been rising. The reduction of active duty military members has caused increased reliance on DoD civilian employees overseas.<sup>6</sup> The same is true of the government contractors.<sup>7</sup> Many of the jobs that were once performed by active duty military members are now the responsibility of civilians.<sup>8</sup> Additionally, the move to an all-volunteer force has increased

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<sup>5</sup> In 1775 the Articles of War addressed the issue by providing that "[a]ll sutlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not [e]nlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." Articles of War art. 32 (1775).

<sup>6</sup> See *infra* notes 35-39 and accompanying text, discussing the increasing numbers of DoD civilians accompanying the military forces overseas.

<sup>7</sup> The GAO estimates that there were over 5000 governments civilian employees, and approximately 9,200 contractor employees deployed during the Gulf War. Charles R. Shrader, *Contractors on the Battlefield*, LANDPOWER ESSAY SERIES, No. 99-6, May 1999, Association of the United States Army. Available at [www.usafa.af.mil/jscope/JSCOPE00/Campbell100.html](http://www.usafa.af.mil/jscope/JSCOPE00/Campbell100.html).

<sup>8</sup> See *Military Extraterritorial Jurisdiction Act of 1999: Hearings on H.R. 3380 Before the Subcomm. On Crime of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong. 9 (2000), Prepared Statement by Mister Robert E. Reed, Office of the General Counsel Office of the Secretary of Defense, Brigadier General Joseph R. Barnes, Office of the Judge Advocate General, U.S. Army, Brigadier General James B. Smith, Commander, 18<sup>th</sup> Fighter Wing Kadena Air Force Base, Before the House Committee on the Judiciary Subcommittee on Crime, on the Military Extraterritorial Jurisdiction Act, [hereinafter Reed Statement] at 4, testifying that; "[The DoD civilian's] role has increased significantly in recent deployments to Somalia, Haiti, Rwanda and

the number of service members who are married and have families. Each of these factors has contributed to the increase in the number of civilians who are overseas due to their association with the military.

#### A. THE DEMISE OF COURT-MARTIAL JURISDICTION.

Historically, the military has dealt with any crimes committed by civilians associated with the military by trying them in a court-martial, in much the same way that the military would try a service member.<sup>9</sup> The American genesis of this jurisdiction over civilians goes all the way back to the Articles of War.<sup>10</sup> The Articles of War date back to the American Revolution, and were the first code of military justice in the United States. The authority to court-martial civilians continued with the implementation of the

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the Balkans. In fact, it is not unusual for the civilians accompanying the U.S. forces at a particular overseas location to outnumber uniformed personnel."

<sup>9</sup> See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 267 (1960) (Justice Whittaker dissenting in part and concurring in part).

Numerous instances of the exercise of military jurisdiction over civilians serving with the army are detailed in Washington's Writings. A "Wagon Master" was so tried and acquitted on January 22, 1778. (Vol. 10, p. 359.) A "waggoner" was so tried and sentenced on May 25, 1778 (Vol. 11, p. 487), and another on September 2, 1780. At the same time, an 'express rider' was so tried and convicted. (Vol. 20, pp. 24-25.) On September 21, 1779, a "Commissary of Issues" and a "Commissary of Hides" were tried by court-martial. (Vol. 16, pp. 385-386.) On September 23, 1780, another "waggoner" was so tried and acquitted. (Vol. 20, pp. 96-97.) On December 6 and 16, 1780, another "commissary" and also a "barrack master" were so tried. (Vol. 21, p. 10, and pp. 22-23.) Numerous other court-martial trials of civilians serving with the army are recited in Vol. 10, p. 507; Vol. 12, p. 242; Vol. 13, pp. 54, 314; Vol. 21, p. 190.

<sup>10</sup> Articles of War, Second Article, 10 U.S.C.A. § 1473(d), Act of June 4, 1940, chapter 227, subchapter II, Section 1, 41 Stat. 787, which reads:

Art. 2. Persons subject to military law. The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles:

(d) All retainers to the camp and all persons accompanying or servicing with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.

Uniform Code of Military Justice (UCMJ) in 1951.<sup>11</sup> The jurisdictional section of the UCMJ specifically included certain civilians. Article 2(a)(11) provided,

The following persons are subject to this chapter...Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by or accompanying the armed forces without the continental limits of the United States...<sup>12</sup>

This provision provided court-martial jurisdiction for all offenses enumerated under the UCMJ; however, in practice it was generally limited in practice to offenses having a direct civilian counterpart rather than strictly military offenses. While civilians were rarely court-martialed, the practice of trying civilians accompanying the Armed Forces in the field continued throughout the period of the First and Second World Wars.<sup>13</sup>

The military's ability to exercise judicial control over its overseas civilian component came to a sudden halt with a series of United States Supreme Court decisions holding that the practice of prosecuting civilians in courts-martial was unconstitutional. The first of these cases was *Reid v. Covert*.<sup>14</sup> *Reid* involved two women who killed their active duty military husbands while serving overseas. Both of these women were court-martialed, convicted, and sentenced to life imprisonment.<sup>15</sup> Their appeals dealt with the constitutionality of the military exerting jurisdiction over them, without providing them with the full constitutional protections that would be given them in a civilian trial.

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<sup>11</sup> 10 U.S.C. §§ 801-946.

<sup>12</sup> 10 U.S.C. § 802(a)(11).

<sup>13</sup> See *Kinsella*, 361 U.S. at note 9, noting that

Aside from traffic violations, there were only 273 [court-martial] cases (both capital and noncapital) involving dependents subject to foreign jurisdiction during the period between December 1, 1954, and November 30, 1958. This number includes 54 "Offenses against economic control laws" and 88 offenses denominated "other". (citations omitted).

<sup>14</sup> 354 U.S. 1 (1957).

<sup>15</sup> *Reid*, 354 U.S. at 3-5.

The court's decision in *Reid* dealt with the relationship between the treaty powers of the executive compared to rights given to individuals in the Constitution. That was because the court-martial jurisdiction over these women initially came from the combination of UCMJ Article 2, as well as the Status of Forces Agreement (SOFA). A SOFA is a treaty between a nation that is sending armed forces to a foreign nation and the host nation where those troops will be stationed.<sup>16</sup> In *Reid* the SOFA in question was an executive agreement between the U.S. and the United Kingdom, and it granted the U.S. jurisdiction to try civilians accompanying the troops in a court-martial.<sup>17</sup>

The court held that the court-martial's lack of a grand jury investigation and jury trial denied the defendant's their constitutional rights.<sup>18</sup> The court went on to discuss why the constitution rights applied overseas and why the SOFA could not trump them.<sup>19</sup> One of the limiting features of the *Reid* decision was that it dealt with capital punishment, and the holding was limited to military dependents and capital cases.<sup>20</sup> Thus, there was the possibility that the military might still be able to exercise court-martial jurisdiction over family members stationed overseas in non-capital cases.

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<sup>16</sup> See *infra* notes 46-50 and accompanying text for a discussion of the NATO SOFA and its provisions regarding extradition of civilians as an example of how SOFAs work.

<sup>17</sup> *Reid*, 354 U.S. at 15.

<sup>18</sup> *Id.* at 7-20, 20-41.

<sup>19</sup> The government had argued that the Supremacy Clause placed treaty law on the same plane as the Constitution. The Supremacy Clause, Article VI of the Constitution, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;". U.S. CONST. art VI, § 2. The court rejected the government's argument, and held that the Executive's treaty powers are subject to the Constitution's provisions.

<sup>20</sup> *Reid*, 354 U.S. at 41, (Frankfurter concurring), "These cases involve the constitutional power of Congress to provide for trial of civilian dependents accompanying members of the armed forces abroad by court-martial in capital cases."

Any potential that *Reid* would be limited to its facts was eliminated three year later in *Kinsella v. United States ex rel. Singleton*.<sup>21</sup> *Kinsella* involved a military member and his wife, both of whom were charged with unpremeditated murder in the death of one of their children.<sup>22</sup> They both pled guilty at a court-martial, and she was sentenced to a term of confinement.<sup>23</sup> The court re-affirmed the reasoning behind *Reid* and expanded it to include family members charged with non-capital offenses.<sup>24</sup>

At the same time, the court extended these decisions to military's civilian employees when they were overseas. In *Grisham v. Hagen*,<sup>25</sup> the court summarily extended the *Reid* holding to civilian employees who were charged with capital offenses.<sup>26</sup> The *Kinsella* opinion was also extended to civilian employees charged with non-capital offenses in *McElroy v. Guadliardo*.<sup>27</sup>

With this series of decisions, the court-martial jurisdiction over virtually all persons covered by Article 2(a)(11) of the UCMJ was declared unconstitutional.<sup>28</sup> Because U.S. criminal provisions typically do not have extraterritorial application, there

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<sup>21</sup> 361 U.S. 234 (1960).

<sup>22</sup> *Id.* at 236.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 248 holding, "We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand [court-martial jurisdiction] so as to include prosecution of civilian dependents for capital crimes, it cannot expand [court-martial jurisdiction] to include prosecution of them for noncapital offenses."

<sup>25</sup> 361 U.S. 278 (1960).

<sup>26</sup> *Id.* at 280.

<sup>27</sup> 361 U.S. 281 (1960).

<sup>28</sup> These Supreme Court decisions did not change the military's jurisdiction to court-martial civilians serving with or accompanying the armed forces in the field during time of war. UCMJ Art. 2(a)(10), 10 U.S.C. §802(a)(10). "In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Reid*, 354 U.S. at 33.

then was no domestic jurisdiction over these offenses at all, and the jurisdictional gap began.

However, the need to be able to hold overseas DoD civilians judicially accountable for their actions was not eliminated by the Supreme Court's decisions. Congress recognized this need and made numerous attempts to introduce legislation that would extend U.S. jurisdiction extraterritorially to DoD civilians.<sup>29</sup> While none of these bills ever reached the status of law, they are significant because they demonstrate the continuing nature of the problem posed by the jurisdictional gap. In the years after *Reid*, there has been consistent Congressional interest and concern regarding the issue.

Congress obviously could not simply return full jurisdiction over these individuals to courts-martial after the *Reid* decision. Thus, they turned to other methods to make U.S. law applicable to DoD civilians while overseas. The various bills employed somewhat different tactics to extend federal jurisdiction to these crimes, but the common thread was the concern that leaving these crimes unpunished was unacceptable.<sup>30</sup>

#### B. THE NEED FOR LEGISLATION.

The issue of extraterritorial jurisdiction over DoD civilians has led to UCMJ jurisdiction, multiple Supreme Court decisions, numerous legislative attempts to reassert

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<sup>29</sup> See e.g., S.761 & S.762, 89th Cong., 2d Sess. (1966); S. 2007, 90th Cong., 1st Sess. (1967); H.R. 226, 90th Cong., 1st Sess. (1967); H.R. 18857, 91st Cong., 2d Sess. (1970); H.R. 18548 & 18548, 91st Cong., 2d Sess. (1970); S. 1744 & 1745, 92nd Cong., 1st Sess. (1971); S.1, 94th Cong., 1st Sess. (1975) and H.R. 3907, 94th Cong., 1st Sess. (1975); H.R. 763, 95th Cong., 1st Sess. (1977); H.R. 255, 99th Cong., 1st Sess. (1985); S. 147, 101st Cong., 1st Sess. (1989); S. 182, 102d Cong., 1st Sess. (1991); H.R. 5808, 102d Cong., 2d Sess. (1992); S. 129, 103d Cong., 1st Sess. (1993); H.R. 4531, 103d Cong., 2d Sess. (1994); S. 288, 104th Cong., 1st Sess. (1995); H.R. 808, 104th Cong., 1st Sess. (1995); S. 74 104th Cong., 1st Sess. (1995); S. 2083, 104th Cong., 2d Sess. (1996).

<sup>30</sup> See e.g., S. 2007 *supra* note 29. The memorandum accompanying the bill clearly addressed this concern, stating "Articles 107-132 of the Uniform Code of Military Justice prohibit certain acts which might be committed by a civilian employee or dependent and perhaps with disastrous consequences."

jurisdiction, and the re-introduction of extraterritorial jurisdiction with the MEJA. There are two overarching considerations that form the underlying bases for all of this attention to the jurisdictional gap. The first is the need for military discipline and control in the overseas environment, and the second is to be able to maintain good relations with our host nations.<sup>31</sup>

The 1960 Supreme Court was not impressed with either of these considerations. In *Kinsella*, the court specifically rejected the first argument, almost to the point of belittling it.

Furthermore, we are not convinced that a critical impact upon discipline will result, as claimed by the Government (even if anyone deemed this a relevant consideration), if noncapital offenses are given the same treatment as capital ones by virtue of the second *Covert* case. The same necessities claimed here were found present in the second *Covert* case (see the dissent there) and were rejected by the Court. Even if the necessity for court-martial jurisdiction be relevant in cases involving deprivation of the constitutional rights of civilian dependents, which we seriously question, we doubt that the existence of the small number of noncapital cases now admitted by the Government in its brief here, when spread over the world-wide coverage of military installations, would of itself bring on such a crisis. And still we heard no claim that the total failure to prosecute capital cases against civilian dependents since the second *Covert* decision in 1957 had affected in the least the discipline at armed services installations.<sup>32</sup>

However, these Supreme Court decisions did not put the issue to rest. Congress has looked at the issue nearly 20 times in the intervening years,<sup>33</sup> and the *Gatlin* decision

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<sup>31</sup> See H.R. Rep. No. 106-778 at 12 (2000), stating,

The inability of the United States to appropriately pursue the interests of justice and hold its citizens criminally accountable for offenses committed overseas has undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas. In addition, the inability of U.S. authorities to adequately respond to serious misconduct within the civilian component of the U.S. Armed Forces, presents the strong potential for embarrassment in the international community, increases the possibility of hostility in the host nation's local community where our forces are stationed, and threatens relationships with our allies.

<sup>32</sup> *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 243-244 (1960).

<sup>33</sup> See *supra* note 29 and accompanying text listing the various bills introduced to close the jurisdictional gap.



demonstrates the impact of the lack of jurisdiction in a very compelling fashion.<sup>34</sup> Did the Supreme Court just get it wrong, or did something change after the Supreme Court's *Kinsella* decision in 1960?

The world and our military forces certainly have changed in the intervening years. In his dissenting opinion in *Kinsella*, Justice Harlan noted that at the time there were approximately 25,000 civilian employees stationed overseas by the Department of Defense in 63 countries.<sup>35</sup> In 2000, there were over 86,000 DoD civilians in over 80 different countries.<sup>36</sup>

The reason for this increase is largely technological. The high tech nature of modern weapons systems has required civilian workers to run and maintain them.<sup>37</sup> A military deployment of any size will almost certainly require a cadre of civilian employees for support.<sup>38</sup> Another explanation for the growth of the civilian workforce is the reduction of the military workforce. Years of military reductions have fueled a movement to outsource much of the work that has traditionally been done by those in uniform. In many instances the contractor has replaced the soldier.<sup>39</sup> Thus, one factor that has fueled the calls for jurisdiction has been the expanding use of civilians in the field with the military forces.

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<sup>34</sup> See *infra* notes 6-96 and accompanying text discussing the facts of the *Gatlin* case.

<sup>35</sup> *Kinsella*, 361 U.S. at 264, (Justice Harlan dissenting).

<sup>36</sup> Directorate for Information, Operations, and Reports, Department of Defense, Worldwide Manpower Distribution by Geographical Area, 15-17 (2000) [hereinafter DIOR Report] available at <http://web1.whs.osd.mil/mmids/mmids/home.htm>.

<sup>37</sup> See Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV., 114, 116 (1995).

<sup>38</sup> *Id.*

<sup>39</sup> See Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23, 25 (2000) [hereinafter Eichelman].

Additionally, many of the Justices of the 1960 Supreme Court itself were convinced that there was a need for jurisdiction, as both the *Kinsella* and *Reid* decisions had strong dissents. Justice Harlan noted the fractured nature of the *Reid* court in his dissenting opinion in *Kinsella*.<sup>40</sup> In that dissent he also gave much more credence to the government's reasoning than did the majority.<sup>41</sup> In reading these opinions, it becomes obvious that the court was split over these issues. While the majority carried the day in 1960, perhaps the dissenters had the better argument as to the merits of the government's concerns. This is certainly demonstrated by the number of times that Congress has revisited the issue, as well as the literature that has developed around it which has generally considered the practical problems that have arisen after the *Reid* decision as proof of the need for jurisdiction.<sup>42</sup>

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<sup>40</sup> *Kinsella*, 361 U.S. at 252 (Justice Harlan dissenting).

There was, however, no opinion for the Court. Four Justices joined in an opinion broadly holding that "civilians" can never be criminally tried by military courts in times of peace, *id.*, at 3-41. Two Justices concurred specially in the result, on the narrow ground that Article 2 (11) could not be so applied to civilian service dependents charged with capital offenses, explicitly reserving judgment, however, as to whether nonmilitary personnel charged with other than capital offenses could be subjected to such trials. *Id.*, at 41-64, 65-78. Two Justices dissented, adhering to the grounds expressed in the earlier majority opinions. *Id.*, at 78. And one Justice did not participate in the cases.

<sup>41</sup> *Id.* at 259 (Justice Harlan dissenting), stating that, "Today's decisions are the more regrettable because they are bound to disturb delicate arrangements with many foreign countries, and may result in our having to relinquish to other nations where United States forces are stationed a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements." See also Justice Frankfurter's concurring opinion in *Reid*, noting that, "The Government speaks of the 'great potential impact on military discipline' of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized."

<sup>42</sup> See, e.g., Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. R. 273 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment -- Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971); Robinson O. Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366 (1960); Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces -- A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas -- Still With Us*, 117 MIL. L. REV. 153 (1987); Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958).

These practical problems tend to be seen in three major areas. The first is the concern that the individual may escape punishment for the crime completely if the host nation does not prosecute the case. The second area of concern is the possibility that the host nation will exercise its jurisdiction, but that it will not be fair to the defendant. A final concern is that the jurisdictional vacuum could lead to jurisdiction from an international court.

#### 1. UNPUNISHED CRIME.

The fact that many crimes go completely unpunished is clearly the single biggest factor in the need for extraterritorial jurisdiction. The legislative history to the MEJA states that, "Clearly, no crime, especially violent crimes and crimes involving significant property damage, should go unpunished when it is committed by persons employed by or accompanying our military abroad."<sup>43</sup> The legislative history also states that every year, there are numerous cases of serious crimes that go unpunished because the host nation waives jurisdiction to prosecute, and that the U.S. is not able to prosecute.<sup>44</sup> This jurisdictional gap is demonstrated by the way most of our SOFA's are constructed.

A typical SOFA will deal with a number of issues, including taxes, employment of local nationals, procurement of supplies, as well as jurisdictional issues.<sup>45</sup> An example of such an agreement is the NATO SOFA.<sup>46</sup> After setting out agreements and procedures for such things as passports, visas and driver's licenses, the treaty deals with the criminal jurisdiction over the sending nation's citizens who are stationed in the host nation's

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<sup>43</sup> H.R. Rep. No. 106-778, at 12.

<sup>44</sup> *Id.* at 9. See *infra* note 60 and accompanying text discussing the results of a DoD IG examination of the investigation and prosecution of civilian offenses overseas.

<sup>45</sup> See Eichelman, *supra* note 39 at 23.

<sup>46</sup> Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 UST 1792, TIAS No. 2846, 199 UNTS 67 [hereinafter NATO SOFA].

territory. Article VII gives the sending nation primary jurisdiction over military members, and the host state primary jurisdiction over civilians, although there is concurrent jurisdiction over both.<sup>47</sup> The host nation is given exclusive jurisdiction if the crime is punishable only under the host nation's laws, but not those of the sending state.<sup>48</sup> Finally, the two nations exercise concurrent jurisdiction over both military and civilians where the offense is solely against the sending state or its persons, or if it arises out of an official duty.<sup>49</sup> The jurisdictional gap is most prominent in the final concurrent jurisdiction provision. When the offense is mainly against the sending nation's interest, the host nation has very little incentive to prosecute the case and often does not. After the *Reid* and *Kinsella* decisions, the U.S. had no jurisdiction over the offense.<sup>50</sup> Thus, if the host nation declined to exercise jurisdiction, the offender could not be brought to trial at all. This occurred with some regularity. In 1979 the General Office (GAO) issued a report regarding the number of such occurrences.<sup>51</sup> The report found that in 1977, the host nations had waived their right of prosecution in over 100 cases.<sup>52</sup> 59 of those incidents involved serious crimes such as rape, manslaughter, arson, robbery and burglary.<sup>53</sup>

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<sup>47</sup> *Id.* at art. VII(1).

<sup>48</sup> *Id.* at art. VII(2)(b).

<sup>49</sup> *Id.* at art. VII(3)(a).

<sup>50</sup> These treaties do not grant jurisdiction over DoD civilians to military courts, but merely allocated responsibility for the prosecution of offenses. *See Reid* 354 U.S. at 16-19 (holding that treaties cannot grant jurisdiction that would violate the Constitution).

<sup>51</sup> General Accounting Office, *Some Criminal Offenses Committed Overseas by DoD Civilians Are Not Being Prosecuted: Legislation is Needed*, Report No. FPCD 79-45 (1979) [hereinafter GAO Report].

<sup>52</sup> There may have been valid reasons for the host nation to decline prosecution in any given case. The cases may have involved very minor infractions, legitimate defenses or possible evidentiary problems. It is unlikely, however, that such issues motivated all of the waivers of jurisdiction.

<sup>53</sup> GAO Report, *supra* note 51.

This jurisdictional gap also occurred if the offense was a crime only under U.S. law, and not the law of the host nation.<sup>54</sup> If the host nation did not have a criminal provision against the offense, it could not try the case even if it wanted to because the conduct was not an offense under its domestic law. The GAO report did not consider these incidents, because it only looked at waivers of jurisdiction. In this situation there would not be local jurisdiction in the first place, and therefore there would not be a record of a waiver. Because there would not be a recorded waiver of jurisdiction from the host nation, there is no way to estimate how many of these types of cases have occurred.

There have also been a number of cases where host nation jurisdiction is non-existent. In the recent past there have been a number of military deployments to locations that lacked the local infrastructure to take on jurisdiction. For example, deployed personnel to Haiti and Rwanda found that the host nation did not have a functioning court system, and thus could not exercise any jurisdiction at all.<sup>55</sup> Additionally, there are treaties that give the U.S. exclusive jurisdiction regarding overseas civilians. The Dayton Accords between the U.S. and the Balkan countries is one such example.<sup>56</sup>

Each of these situations left the offender untried, and the only way to deal with the offender was through the administrative tools of the overseas military commander. The most severe punishment a commander can give an employee or contractor is the loss

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<sup>54</sup> See *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Justice Harlan concurring in the result); Quite aside from the fact that in some countries where we station troops the protections granted to criminal defendants compare unfavorably with our own minimum standards, the fact would remain that many of the crimes involved -- particularly breaches of security -- are not offenses under foreign law at all, and thus would go completely unpunished.

<sup>55</sup> Eichelman, *supra* note 39 at 25.

<sup>56</sup> Reed Testimony, *supra* note 8 at 19.

of employment.<sup>57</sup> Family members might be barred from some of the facilities, such as the base stores or theaters, or even barred from the base itself.<sup>58</sup> This particular punishment would have the curious effect of placing the troublemaker into even closer contact with the host nation and increasing the risk of international problems. Ultimately, the commander has the ability to send the offender back to the U.S.; however, there will not be a conviction or any official record of the criminal misconduct.<sup>59</sup>

The DoD Inspector General (DoD IG) did a study of offenses committed by DoD civilians overseas as part of an evaluation of the military criminal investigative organizations (MCIOs) in 1999.<sup>60</sup> In that report they identified the shortfall in reporting of offenses committed by DoD civilians.

Our evaluation determined that a significant number of serious offenses committed by U.S. civilians stationed overseas are not being reported to the Congress (Finding B). This is because DoD Directive 5525.1, "Status of Forces Policies and Information," which sets forth reporting requirements on U.S. civilians stationed overseas is limited to cases reserved by a foreign country and those cases released by foreign authorities to the U.S. for disposition. Not included are serious cases investigated by the Military Criminal Investigative Organizations in which the host country had no interest or which were not referred or reported to the host country. As a result, Congress is unaware of the actual amount of serious crime committed under these circumstances and cannot take such information into consideration to effect legislative decisions.<sup>61</sup>

The DoD IG went directly to the MCIO's<sup>62</sup> investigative records to determine the number of serious crimes being committed by overseas DoD civilians. The report defined serious offenses as: "murder, rape, manslaughter & negligent homicide, arson,

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<sup>57</sup> H.R. Rep. 106-778 at 10.

<sup>58</sup> *Id.*

<sup>59</sup> Eichelman, *supra* note 39 at 25.

<sup>60</sup> *Evaluation of the Military Criminal Investigative Organizations' Investigative Effectiveness Regarding U.S. Forces Civilians Stationed Overseas*, Report No. 995009I, Office of the Inspector General, DoD, September 9, 1999 [hereinafter DoD IG Report].

<sup>61</sup> *Id.* at ii (footnotes omitted).

robbery & related offenses, aggravated assault, child abuse, drug distribution and drug possession with intent to distribute.”<sup>63</sup> When the DoD IG looked at the investigative records of the MCIO’s, they found over 1,900 investigations in the three-year period from January 1995 to December 1997.<sup>64</sup> They then went to 10 bases and reviewed all of the closed cases from those bases’ MCIOs. Of the 275 closed cases from those bases, 31% were disposed of in administrative actions and the host country prosecuted 8%.<sup>65</sup> The remaining 61% either did not record a disposition in the file (21%), were returned to the U.S. (19%), fled (4%) or had no action taken against them (17%).<sup>66</sup>

The fact that less than 9% of these cases ended in a prosecution is quite astounding given the nature of the offenses. Of the 275 cases 4 were murders, 22 were rapes, 55 thefts, 18 aggravated assaults, 30 child/sex abuse, 107 drugs, 28 arson, and 11 “other”.<sup>67</sup> It is unknown which of these cases were prosecuted, but the fact that over 90% of them were not prosecuted demonstrates the extent of the jurisdictional gap, especially given the fact that these cases only represent 275 of the 1900 serious cases over the three-year period.

These figure demonstrate the extent of the jurisdictional gap, and the number of offenders that were escaping punishment entirely. The need to ensure that the offender would be tried, and be punished if convicted, is the principal motivation behind the need to close the jurisdictional gap.

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<sup>62</sup> The MCIOs are the Army’s Criminal Investigative Command, the Air Force’s Office of Special Investigations and the Naval Criminal Investigative Service. *Id.* at i, note 1.

<sup>63</sup> *Id.* at ii, note 2.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> *Id.* at 11.

<sup>66</sup> The report indicates that less than 1% of the cases resulted in a U.S. federal conviction. *Id.*

<sup>67</sup> Offenses termed “other” included bribery, misuse of government property, invasion of privacy, black market activity and indecent assault. *Id.*

## 2. FOREIGN CRIMINAL JUSTICE SYSTEMS.

The jurisdictional gap also raises concerns because it exposes overseas DoD civilians to the varying degrees of protections afforded an accused under different host nation's legal systems. Some host nations have extremely severe punishments that can shock American sensibilities, and many host nations have courts with procedural protections that are much lower than the U.S.<sup>68</sup> The Senate addressed this to a certain extent in its advice and consent to the NATO SOFA, by requiring the military to request that the host nation waive jurisdiction if there was any concern about the host nation's court system.<sup>69</sup> However, granting this request is discretionary on the part of the host nation, and jurisdiction is not always waived.

Host nations may have penalties that are far more severe than those authorized by U.S. courts.<sup>70</sup> Saudi Arabia is a case in point. Many of the punishments listed under Islamic law are not available in our domestic courts, including severing the hands of thieves and stoning.<sup>71</sup> The case of the young American who was sentenced to caning in

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<sup>68</sup> Gibson, *supra* note 37 at 153.

<sup>69</sup> The Senate declaration does not expressly require that the United States attempt to obtain jurisdiction in all cases, but only when "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States." NATO SOFA, *supra* note 41, T.I.A.S. No. 2846, p. 36. The Department of Defense implemented the Senate's mandate in Department of Defense Directive 5525.1, Status of Forces Policies and Information (20 Jan. 1966) and a tri-service regulation. Army, Reg. No. 27-50/SECNAVINST 5820.4D/AFR 110-12 (1 Dec. 1984), Status of Forces Policies, Procedures and Information (providing that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements." *Id.* at para. 1-7 (a)).

<sup>70</sup> See, e.g. *Gallagher v. United States*, 423 F.2d 1371, 1374, 191 Ct.Cl. 546 (1970), *cert. denied*, 400 U.S. 849 (1970), where the judge took judicial notice that many servicemen are stationed in overseas areas, "some of which have a reputation for harsh laws and savagely operated penal institutions.

<sup>71</sup> See Gibson, *supra* note 37, at 153.



Singapore dramatically demonstrates the differences in punishments between different legal systems.<sup>72</sup>

A further concern is that foreign courts do not always provide the same procedural protections in their criminal courts as the U.S. criminal justice system. This variance in procedure can even rise to the level of discrimination against Americans in foreign courts.<sup>73</sup> Protection of civilians from such situations was also a strong motivator to close the jurisdictional gap.<sup>74</sup>

### 3. INTERNATIONAL TRIBUNALS.

The possibility that the vacuum of jurisdiction over these civilians could open them to the jurisdiction of an International Tribunal is another issue that was evaluated in the literature that has developed since the *Reid* decision.<sup>75</sup> It is difficult to imagine, given the controversy regarding the Rome Statute for the International Criminal Court (ICC), that the ICC's jurisdiction was not at least a consideration in the MEJA.<sup>76</sup>

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<sup>72</sup> See, e.g., *Crime and Punishment: Should America be More Like Singapore?*, NEWSWEEK, Apr. 18, 1994, at 18.

<sup>73</sup> See *Williams v. Froehlke*, 490 F.2d 998, 1004 (2d Cir. 1974), stating, "it was undoubtedly thought [by Congress] a boon to the accused to permit his trial in a court-martial rather than in a foreign court where a soldier might be subject to varying degrees of xenophobia".

<sup>74</sup> "Considerable concern has been expressed that the U.S. has been required to allow U.S. citizens to be subjected to the criminal jurisdiction of host nations whose judicial systems do not provide the rights, guarantees, and procedural safeguards available under the U.S. constitution." Reed Testimony, *supra* note 8 at 5.

<sup>75</sup> See Gibson *supra* note 37 at 141-147.

<sup>76</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, UN Doc. No. A/CONF. 183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute]. There were numerous attempts to pass legislation that would close the jurisdictional gap prior to the MEJA, but none of them made it out of committee. See *supra* note 29 and accompanying text. The two events that occurred immediately prior to the passage of the MEJA were the *Gatlin* decision and the apparently imminent genesis of the ICC. While *Gatlin* is specifically mentioned in the legislative history and the ICC is not, the ICC may have been one of the factors that motivated Congress to pass the legislation at this time.

The ICC is a proposed International tribunal that would be a standing court to try international crimes. It has been signed by 139 nations, and ratified by 29.<sup>77</sup> It requires ratification by 60 nations to be established.<sup>78</sup> It is anticipated that it will get the required number of signatures shortly. The U.S. has signed the Rome Statute, but has not ratified it.<sup>79</sup>

The jurisdiction of the ICC will be to try cases involving the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>80</sup> While it is difficult to imagine a DoD civilian committing the crimes of genocide, or the international crime of aggression, it is entirely possible that they might be charged with crimes against humanity and/or war crimes.

The definition of crimes against humanity includes the crimes of murder and rape when part of a widespread attack.<sup>81</sup> The definition of war crimes also includes rape, if it meets other qualifications.<sup>82</sup> Thus, the ICC could try a DoD civilian who commits a rape during a military action on charges of war crimes or crimes against humanity. However, the jurisdiction of the ICC is limited by its admissibility requirements, which state that a case is only admissible if the offender's home state is unable or unwilling to prosecute it.<sup>83</sup> Thus, an unfilled jurisdictional gap would open DoD civilians to the jurisdiction of the ICC, assuming that all other jurisdictional criteria were also satisfied.

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<sup>77</sup> See [www.un.org/law/icc/statute/status.htm](http://www.un.org/law/icc/statute/status.htm), visited 13 April, 2001.

<sup>78</sup> Rome Statute, *supra* note 77 at art. 126.

<sup>79</sup> See [www.un.org/law/icc/statute/status.htm](http://www.un.org/law/icc/statute/status.htm), visited 13 April, 2001

<sup>80</sup> Rome Statute, *supra* note 77 at art. 5(1).

<sup>81</sup> *Id.* at art. 7(1).

<sup>82</sup> *Id.* at art. 8(2)(b)(xvii) and (e)(vi).

<sup>83</sup> *Id.*, at art. 17.

Issues of admissibility:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

Potential international jurisdiction is an additional issue that is created by the jurisdictional gap over DoD civilians overseas. There has been considerable concern about subjecting U.S. personnel to an international tribunal that may be susceptible to outside political pressures.<sup>84</sup> This concern extends to DoD civilians as well as to military members who might be brought before such an international tribunal and is another factor demonstrating the need for domestic jurisdiction.

#### 4. GATLIN.

The need to close the jurisdictional gap came to a head with the case of *United States v. Gatlin*.<sup>85</sup> Gatlin involved a male civilian living in base housing in Germany with his military wife and teen-aged stepdaughter. Allegations of sexual abuse arose after the family returned to the U.S., when the stepdaughter revealed she was pregnant with Gatlin's child.<sup>86</sup> Gatlin was charged with sexual abuse of a minor,<sup>87</sup> and pled guilty. However, before the plea was accepted, he made a motion to dismiss for lack of jurisdiction.<sup>88</sup>

The district court found that jurisdiction existed, based on the assumption that the military housing area was included in the "special maritime and territorial jurisdiction of

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(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

<sup>84</sup> See e.g., William Safire, *The Purloined Treaty*, DENVER POST, Tuesday April 10, 2001 p. B-07., arguing, "An international prosecutor, answerable to no nation and unrestrained by any Bill of Rights, is the rest of the world's weapon to bring the too-sovereign superpower to heel. Were we to subject ourselves to the rule of the lawless, no U.S. sailor or president could travel abroad without becoming vulnerable to arrest by a politically motivated prosecutor."

<sup>85</sup> 216 F.3d 207 (8<sup>th</sup> Cir. 2000).

<sup>86</sup> *Id.* at 209-10.

<sup>87</sup> 18 U.S.C. § 2243(a)(Supp. IV 1999).

<sup>88</sup> *United States v. Gatlin*, 216 F.3d 207, 210 (2000).

the United States."<sup>89</sup> The Second Circuit Court of Appeals reversed. It found that the legislative history demonstrated that Congress intended section 7(3) to apply only domestically. Thus, military housing in Germany was not within the jurisdiction of Title 18.<sup>90</sup>

The remarkable portion of the case was not so much its treatment of the law,<sup>91</sup> as the court's direct address to Congress. Judge Cabranes explicitly attributed the "jurisdictional gap" to the inaction of Congress and called for legislation directly in the court's opinion,<sup>92</sup> with the full knowledge that the MEJA was under consideration.<sup>93</sup> Judge Cabranes even took the unusual step of forwarding a copy of the opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees.<sup>94</sup>

Congress indeed took notice that Gatlin's conviction for impregnating his thirteen year-old stepdaughter had been reversed based on what the 8<sup>th</sup> and 2<sup>nd</sup> Circuits perceived

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<sup>89</sup> Title 18, Section 7(3) defines the "special maritime and territorial jurisdiction of the United States" as: "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. § 7(3).

<sup>90</sup> *Gatlin*, 216 F.3d at 220.

<sup>91</sup> In fact the 9<sup>th</sup> Circuit Court of Appeals has taken the exact opposite approach to the issue of extraterritoriality. In *United States v. Corey*, 232 F.3d 1166 (9<sup>th</sup> Cir. 2000), the 9<sup>th</sup> Circuit held that section 7(3) did apply extraterritorially in circumstances nearly identical to those in *Gatlin*.

<sup>92</sup> *Gatlin*, 216 F.3d at 222-23, stating, "Thus far Congress has not responded to this call for legislation, though its inaction hardly can be blamed on a lack of awareness of the gap....Our decision today is only the latest consequence of Congress's failure to close this jurisdictional gap."

<sup>93</sup> *Id.* at 222.

<sup>94</sup> *Id.* at 223.

Finally, it clearly is within Congress's power to change the effect of this ruling by passing legislation to close the jurisdictional gap. It is for this reason that we have taken the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees. In doing so, we should not be understood to express a view on the justice or wisdom of any potential legislation. In our system of government, "the responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *United States v. First Nat'l Bank of Detroit*, 234 U.S.

as Congressional inaction. The *Gatlin* opinion is detailed as one of the motivating factors for Congressional action in the MEJA's legislative history.<sup>95</sup>

### III. THE MILITARY EXTRATERRITORIAL JURISDICTION ACT.

All of these factors led to the passage of the MEJA. It is the culmination of forty years of various attempts to reassert jurisdiction over DoD civilians stationed overseas and to close the jurisdictional gap. The MEJA was signed into law on November 22, 2000. The MEJA is divided into seven sections, covering the substantive and procedural aspects of the extraterritorial jurisdiction.

#### A. EXTENSION OF DOMESTIC JURISDICTION

The MEJA extends domestic jurisdiction to overseas DoD civilians by giving the United States criminal code extraterritorial application in certain circumstances.<sup>96</sup> The jurisdiction of the MEJA extends to conduct that would have been a crime “if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.”<sup>97</sup> This language tracks very closely with the jurisdictional language used in 18 U.S.C. §7(3) as interpreted by Judge Cabranes in the *Gatlin* opinion, and encompasses offenses that apply in the “special maritime and territorial jurisdiction of the United States”.<sup>98</sup>

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245, 260, 58 L. Ed. 1298, 34 S. Ct. 846 (1914). We merely note that this issue may warrant further congressional scrutiny.

<sup>95</sup> H.R. Rep. 106-778 at 11.

<sup>96</sup> The legislative history gives guidance on what to do if the federal statute referenced in the MEJA already has extraterritorial application. In that situation, the offense could be charged either as an offense under the MEJA, or as a violation of the underlying statute, but not as both. H.R. Rep. No. 106-778, note 28 (citing *United States v. Batchelder*, 442 U.S. 114 (1979)).

<sup>97</sup> 18 U.S.C. § 3261(a).

<sup>98</sup> See *supra* note 89 (defining the term “special maritime and territorial jurisdiction of the United States”).

The legislative history to the MEJA indicates that it also reaches other domestic crimes that do not have such a jurisdictional limitation.<sup>99</sup> The legislative history uses the example of drug crimes under Title 21, which do not have similar jurisdictional language.<sup>100</sup> Thus, virtually anything that would be a crime if committed in the United States would also be criminalized under this section.

The persons covered by the MEJA are those "employed by or accompanying the Armed Forces outside the United States".<sup>101</sup> "Employed by or accompanying" is broad enough to cover military dependents,<sup>102</sup> civilian employees and contractors which includes all of the groups who were targeted by this legislation.<sup>103</sup>

The maximum punishment for an offense under the MEJA is calculated by adopting whatever the maximum punishment would be if the crime were committed in the United States.<sup>104</sup> The overall jurisdiction of the MEJA is limited by these maximum

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<sup>99</sup> H.R. Rep. No. 106-778, at-14-15.

<sup>100</sup> *Id.*, at note 27, noting that, "For example, if a drug crime were committed on land 'reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction' of the United States..." it would also be a crime under this section.

<sup>101</sup> 18 U.S.C. § 3261(a).

<sup>102</sup> The term "accompanying the Armed Forces outside the United States" is defined to include the dependents of, as well as anyone residing with, those employed by the Armed Forces. 18 U.S.C. § 3267(2)(A), (B). The legislative history indicates that the jurisdiction covers juveniles as well as adults. H.R. Rep. No. 106-778, at 21-22. However, juvenile offenders would normally be covered by the federal juvenile delinquency procedures. See Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad-Problem Solved?*, 2000 Army Law. 1, note 93 (2000) [hereinafter Schmitt].

<sup>103</sup> H.R. Rep. No. 106-778 at 7-8. § 3267(1) clarifies that the term "employed by the Armed Forces outside the United States" includes all civilian employees, contractors and employees of contractors who are outside the United States in connection with their employment. 18 U.S.C. § 3267(1)(A), (B). The only overseas employees that are not covered are those that are residents or nationals of the host country. 18 U.S.C. § 3267(1)(C). The legislative history states that "This limitation recognizes that the host nation has the predominant interest in exercising criminal jurisdiction over its citizens and other persons who make that country their home." H.R. Rep. No. 106-778, at 19. Employees who are nationals of a third country are still subject to U.S. jurisdiction under the MEJA.

<sup>104</sup> 18 U.S.C. § 3261(a).

punishments as well, with only crimes having a maximum punishment of more than one year being covered under the MEJA.<sup>105</sup>

## B. HOST NATION PRIMARY JURISDICTION

The MEJA follows the lead of most SOFAs by giving primary jurisdiction over these offenses to the foreign government.<sup>106</sup> The MEJA also gives a type of double jeopardy protection by generally forbidding prosecution of an offense if a foreign government has already prosecuted the crime.<sup>107</sup> This protection comes with two caveats; however, neither of these exceptions is likely to be used routinely.<sup>108</sup>

The MEJA gives the military law enforcement officials the authority to deliver a suspect to the local authorities, if the host nation requests jurisdiction.<sup>109</sup> This is somewhat different than a typical SOFA, in that it requires an affirmative request for jurisdiction from the host nation rather than requiring the U.S. authorities to request a waiver of jurisdiction from the hosts.<sup>110</sup> A treaty or other international agreement between the U.S. and the host nation must authorize delivery of the suspect to the host

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<sup>105</sup> *Id.* This provision is similar to that of many extradition treaties, that define an extraditable offense as one that is punishable by a maximum sentence to imprisonment or other deprivation of liberty of at least one year or more. See Section IV for a discussion of various extradition treaties and their impact on the MEJA.

<sup>106</sup> 18 U.S.C. § 3261(b), 3263(a).

<sup>107</sup> 18 U.S.C. § 3261(b).

<sup>108</sup> The first exception is that the foreign government must have jurisdiction that is recognized by the United States. The second exception is something of a trump card, allowing the Attorney General or Deputy Attorney General to approve a prosecution under the MEJA even if there has been a foreign prosecution. 18 U.S.C. § 3261(b). See *supra* Section II(B)(2), discussing the concerns regarding foreign courts that led to the adoption of the MEJA. Thus, an acquittal, or an extremely light punishment, would not bar re-prosecution under the MEJA if the Attorney General decided that either the trial or the punishment was incompatible with domestic notions of criminal justice.

<sup>109</sup> 18 U.S.C. § 3263(a)(1).

<sup>110</sup> See *supra* note 46 and accompanying text detailing the waiver mechanism of the NATO SOFA.

nation.<sup>111</sup> This will typically be detailed in a SOFA with the host nation.<sup>112</sup> The MEJA also gives primary jurisdiction to the military courts in cases where there may be concurrent jurisdiction with the UCMJ.<sup>113</sup>

### C. INITIAL HEARING

The MEJA has unique provisions for how the initial hearings are to be conducted.<sup>114</sup> The primacy of host nation jurisdiction is acknowledged, in that the initial appearance only takes place under this section if the host nation does not request jurisdiction.<sup>115</sup> The initial hearing must be conducted by a federal magistrate, and may occur domestically if the defendant has been removed to the U.S. prior to the hearing.<sup>116</sup> Normally, the initial appearance will be conducted telephonically, or by "such other means that enable voice communication among the participants, including any counsel representing the person."<sup>117</sup> The legislative history indicates that video teleconference is the preferred method for conducting such a hearing when it is possible.<sup>118</sup>

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<sup>111</sup> 18 U.S.C. § 3263(a)(2).

<sup>112</sup> See Schmitt, *supra* note 102 at 5.

<sup>113</sup> 18 U.S.C. § 3261(d). This provision brings the overseas service member to parity of jurisdiction with the overseas civilians under the MEJA, and stateside military members under domestic law. *But see* notes 349-355 and accompanying text discussing the possible extension of the uniquely military UCMJ provisions beyond the date of separation.

<sup>114</sup> Schmitt states that this section was added by the McCollum amendment in order "to harmonize the extraterritorial arrest authority of § 3262 with the preliminary proceedings procedures of the FRCP". Schmitt, *supra* note 102 at 7.

<sup>115</sup> See *infra* notes 324-333 and accompanying text for a discussion of the delivery of a defendant to the host nation.

<sup>116</sup> 18 U.S.C. § 3264(b).

<sup>117</sup> 18 U.S.C. § 3265(a)(1)(B). See H.R. Rep. No. 106-778, at 19, stating that "it is the committee's intent that, in the vast majority of cases, the initial appearance of a person arrested or charged under section 3261 will be conducted by telephone or other appropriate means so that the defendant may remain in the country where he or she was arrested or was found".

<sup>118</sup> *Id.* It is unclear exactly how this provision will work in conjunction with section 3264(b)(5), which allows the Secretary to remove the defendant to the nearest military installation with adequate facilities to conduct such a hearing. The availability of video teleconferencing, especially if requested by the defendant, may justify removal depending on the circumstances.



During the initial hearing the magistrate must make a determination whether probable cause exists that the defendant committed an offense under the MEJA.<sup>119</sup> The magistrate may also determine the nature of pre-trial restraint during the initial appearance.<sup>120</sup> The MEJA also makes provision for the pre-trial detention hearing to be handled overseas.<sup>121</sup> It allows the detention hearing to be conducted by telephone or videophone at the request of the defendant.<sup>122</sup>

The MEJA requires the magistrate to determine the conditions of release at this hearing *sua sponte* if there is not a motion for pre-trial confinement by the government attorney. The magistrate can set the conditions of release consistent with Title 18 Chapter 207, which gives the magistrate the same range of options for conditions of release that would be available stateside.<sup>123</sup>

#### D. CONTINUING CONGRESSIONAL OVERSIGHT

The importance of closing the jurisdictional gap is demonstrated by the Congress' continuing oversight of the process. Congress took an unusual step to maintain its

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<sup>119</sup> 18 U.S.C. § 3265(a)(2). The legislative history indicates that "This determination will satisfy the due process requirements to which the defendant is due as determined by the United States Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975). H.R. Rep. No. 106-778, at 19.

<sup>120</sup> 18 U.S.C. § 3265(a)(3).

<sup>121</sup> 18 U.S.C. § 3265(b).

<sup>122</sup> If the government attorney moves for pre-trial confinement, it could trigger a removal and detention order under section 3264(b)(2). The defendant has the right to request that the hearing be conducted telephonically. 18 U.S.C. § 3265(b)(2). The magistrate has discretion in deciding on the request, but it is likely that most detention hearings will be done in this manner as well. The legislative history lists factors for the magistrate to consider, including "whether the Government opposes the defendant's request (to include considerations based on military exigencies or special circumstances bearing on the issue), the likelihood from information presented at the initial appearance that the defendant will be ordered detained, and whether the parties intend to present live witness testimony at the hearing and the residence of any witnesses." H.R. Rep. No. 106-778, at 19. One of the factors to consider with the witnesses is the likelihood that they will be located in the host country as well. In the absence of such a request, or if the request is denied, the magistrate could issue a removal order to hold the detention hearing in the U.S. 18 U.S.C. § 3264(b).

oversight regarding the implementation of the MEJA. All of the regulations promulgated under §3266 must be submitted by the Secretary of Defense to the Judiciary Committees of the House and the Senate.<sup>124</sup> Any regulations will not be put into effect until 90 days after they have been submitted to the respective committees. The oversight will continue into the foreseeable future because all amendments, in addition to the initial regulations, must be submitted as well.<sup>125</sup> While Congress did not specifically state the reasons behind the continuing oversight, it certainly points again to the emphasis that it has placed on closing the jurisdictional gap.

#### IV. THE DEATH PENALTY AND THE MEJA

One of the concerns that is most likely to arise early in MEJA cases is the conflict between U.S. requests for rendition where imposition of the death penalty is a possibility, and the host countries' obligations under the various human rights treaties. Prosecutions under the MEJA will have to address the impact that various human rights treaties will have on the removal of suspects who are subject to the death penalty. In recent years a body of international law has grown that complicates the rendition of suspects who might face the death penalty. The relevant human rights treaties and decisions have varying legal bases and logic; however, an abolitionist nation generally will not send a suspect back to a nation that might impose the death penalty for the offense. These treaties and decisions will have a significant impact on the practical implementation of the MEJA because of their relationship to the removal of suspects.

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<sup>123</sup> 18 U.S.C. § 3265(a)(3). See 18 U.S.C. § 3142(b), (c) for the potential conditions of release. It is not clear exactly how these conditions would be monitored in the host country.

<sup>124</sup> 18 U.S.C. § 3266(c).

<sup>125</sup> *Id.*

The MEJA sets out a variety of conditions under which a defendant can be returned to the U.S. to stand trial for charges. It is designed to limit the power of the military authorities to forcibly remove a defendant from the host country.<sup>126</sup> The provisions begin with a general prohibition on removing the defendant from the host country.<sup>127</sup> The legislative history sets out this limitation as “[The suspect] may not be forcibly removed from the country in which he is found, except that he may be brought to the country in which the crime is believed to have been committed.”<sup>128</sup> The limitation on removal applies whether the person has been arrested or has been charged by an indictment or information without arrest.<sup>129</sup>

The MEJA then details five separate exceptions to the general prohibition on removal. The first exception is if a federal magistrate judge orders the defendant to be removed to the U.S. for a detention hearing.<sup>130</sup> The second exception to the ban on removal permits the magistrate to order the removal of the defendant if the magistrate finds that pretrial confinement is required.<sup>131</sup> The third exception deals with the situation where a preliminary examination under the Federal Rules of Criminal Procedure (FRCP)

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<sup>126</sup> See Schmitt, *supra* note 102 at 5.

<sup>127</sup> 18 U.S.C. § 3264.

<sup>128</sup> H.R. Rep. No. 106-778, at 18.

<sup>129</sup> *Id.*, at 17.

<sup>130</sup> 18 U.S.C. § 3264(b)(1). 18 U.S.C. § 3142 is entitled “Release or detention of defendant pending trial”. Subsection (f) provides that a detention hearing will be held on the motion of the attorney for the Government under certain circumstances, or in certain cases may even be held by the judge *sua sponte*. 18 U.S.C. § 3142(f). The MEJA also permits the detention hearing to be held telephonically, while the defendant remains in the host country, under certain circumstances. 18 U.S.C. § 3142(d).

<sup>131</sup> 18 U.S.C. § 3264(b)(2). The defendant should be released unless “such release will not reasonably assure the appearance of the person as required and the safety of any other person and the community”. 18 U.S.C. § 3142(b). If pretrial detention is ordered, the MEJA then requires the prompt removal of the defendant to the U.S. to serve the pretrial confinement. 18 U.S.C. § 3264(b)(2). If the judge orders the defendant into pretrial confinement, he must be removed to civilian authorities and cannot be held in military confinement. H.R. Rep. No. 106-778, at 17.

is required.<sup>132</sup> The defendant has the ability to waive such a hearing; however, if the hearing does take place, it must be held in a timely manner and in the U.S.<sup>133</sup> This would obviously require the removal of the defendant to attend the hearing. The fourth exception is a blanket exception, allowing a magistrate to order the removal of the defendant at any time if the judge finds the removal to be necessary.<sup>134</sup> The final exception to the ban on removal permits the Secretary of Defense to order the removal of the defendant based on "military necessity".<sup>135</sup>

Once a suspect is arrested and a judge orders his or her removal, it is not the end of the story. There still has to be some method for the U.S. to actually retrieve the defendant from the foreign country. This will typically be done in the context of an extradition process to get the defendant back to the U.S..<sup>136</sup>

Generally, there is no international obligation for rendition. Nations are not required to turn suspects over to another nation because of the doctrine of national

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<sup>132</sup> See Fed. R. Crim. P. 5, 5.1. The defendant is not entitled to such a hearing if an indictment is returned or an information is filed against the defendant. H.R. Rep. No. 106-778, at 17.

<sup>133</sup> H.R. Rep. No. 106-778, at 17.

<sup>134</sup> 18 U.S.C. § 3264(b)(4). This exception allows the magistrate the flexibility to order such a removal if it is required for a reason that has not been previously listed. This might occur if the military lacked adequate holding facilities, or if being held in the host country would be a hardship for some reason. H.R. Rep. No. 106-778, at 18.

<sup>135</sup> 18 U.S.C. § 3264(b)(5). The removal must be to the nearest U.S. military installation outside the U.S. adequate to detain the defendant that can facilitate the initial appearance. The legislative history indicates that this power is intended to be used "only in situations where the person is arrested in an 'immature theater' or in such other place where it is not reasonable to expect that the initial proceedings required by section 3265 can be carried out." H.R. Rep. No. 106-778, at 18. The facility should be adequate for both the initial appearance and the pretrial detention hearing. *Id.*

<sup>136</sup> Extradition is defined as "the surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." Black's Law Dictionary 585 (6th ed. 1990). See *infra* notes 266-273 and accompanying text discussing alternate methods of removal that would not involve a full extradition proceeding.

sovereignty.<sup>137</sup> If a person committed a crime in country X and fled to country Y, there was nothing in customary international law that requires country Y to send the person back to country X to stand trial. Thus, states have entered into a variety of bilateral and multilateral treaties to regulate the process of extradition.<sup>138</sup>

These extradition treaties are so common, and have taken on such importance, that the United Nations General Assembly has passed a resolution containing a model treaty on extradition.<sup>139</sup> The Model Treaty is very similar to most of the U.S.' extradition treaties in the way that it deals with the death penalty. The Model Treaty sets out the death penalty as an optional ground for refusal to extradite:

Extradition may be refused in any of the following circumstances:...

If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requesting State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.<sup>140</sup>

The Model treaty does not condition the request to whether the host nation imposes the death penalty for the same crime. Some of the U.S.' extradition treaties do include a caveat that limits denial of extradition only to situations where the host nation does not impose the death penalty.<sup>141</sup>

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<sup>137</sup> See Restatement (Third) of Foreign Relations 475 comment (a) (1987), stating that, "Extradition is not required by customary law, and many states do not extradite except as bound to do so by treaty."

<sup>138</sup> See. M. Cherif Bassiouni, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER, 13, 19 (1974), describing the international scheme of bilateral and multilateral extradition treaties.

<sup>139</sup> United Nations General Assembly Resolution on a Model Treaty on Extradition, U.N.G.A. Res. 45/115, 30 I.L.M. 1407, (1991) [hereinafter Model Treaty].

<sup>140</sup> *Id.*, art. 4(d), 30 I.L.M. 1412.

<sup>141</sup> See e.g., the provision in the U.S.-U.K. Extradition Treaty dealing with capital punishment, which is typical of U.S. extradition treaties, stating: "If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party

Removal of defendants becomes an issue with the implementation of the MEJA, because many of the serious crimes that the MEJA is designed to prosecute could be punishable by the death penalty.<sup>142</sup> The ultimate outcome of the case, i.e. whether the defendant actually receives a death sentence, is not the determining factor.<sup>143</sup> The question of whether the host nation will allow the U.S. to remove the suspect to the U.S. to stand trial arises even before the charges have been filed, and must be addressed even before an initial hearing under the MEJA.<sup>144</sup> In practical terms, a promise not to seek the death penalty will have to be the preliminary step to any actions under the MEJA for an offense authorizing the death penalty before any other actions under the MEJA are taken.

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that the death penalty will not be carried out.” Extradition Treaty, June 8, 1972, U.S.-U.K., art. IV, 28 U.S.T. 227, 230 [hereinafter U.S.-U.K. Extradition Treaty].

<sup>142</sup> The death penalty was reintroduced in the U.S. after the U.S. Supreme Court found it to be constitutional in *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). See e.g. 18 U.S.C. §1111 setting the maximum punishment for murder as death. The death penalty is also permitted in a variety of other crimes where death results. See e.g. 18 U.S.C. §2251(d) (death penalty possible for sexual exploitation of children where the death of a person results from the offense); 18 U.S.C. §2245 (death penalty possible for rape where the death of a person results from the offense); 18 U.S.C. §1201(a)(5) (death penalty possible for kidnapping where the death of a person results from the offense); 18 U.S.C. §36(b)(1)(A) (death penalty possible for shooting in an attempt to escape detection during a major drug offense where the death of a person results from the offense).

<sup>143</sup> It is difficult to determine exactly how many federal death penalty possible offenses are committed each year. Many are pled down during the charging phase of the trial etc. However, the Justice Department did a study of the death penalty statistics since the death penalty was expanded in 1994. From 1995 to 2000 there were 682 death penalty possible cases that were submitted to by the various U.S. Attorneys to the DOJ’s Death Penalty Review Committee. In 183 of those cases the U.S. Attorneys recommended the death penalty, and the Committee concurred in all 183 cases. The Attorney General authorized the prosecution to seek the death penalty in 159 of those cases, and 41 of them were convicted of a capital charge. The jury recommended the death penalty in 20 cases, and 4 of those were vacated by the court. At the time of the study, 2 cases were pending approval, and 14 inmates were awaiting execution. The relevant numbers from the study are not the number of executions or even the number of convictions. Rather, the fact that there were well over 100 death penalty possible cases per year that were actually charged demonstrates the potential scope of the removal issue. *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, U.S. Department of Justice, 2001 [hereinafter Death Penalty Report]. Available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>, visited July 3, 2001.

<sup>144</sup> The MEJA gives the host nation primary jurisdiction, and the fact that the U.S. authorizes the death penalty will certainly arise when the host nation is deciding whether or not to assert that jurisdiction for certain offenses. See *supra* notes 106-113 and accompanying text.

There are currently 60 federal offenses that carry the death penalty.<sup>145</sup> These offenses include the most serious federal crimes, and generally focus on murder or other offenses where the victim of the crime dies. The death penalty issue will need to be addressed with the host nation every time one of these offenses is alleged under the MEJA.

It is unlikely that there will be huge numbers of death penalty cases that arise under the MEJA. However, an overseas DoD civilian who murders either a host nation national or a U.S. citizen will have tremendous impact on both the good order and discipline of the overseas military and the international relations with the host nation. These are precisely the high profile cases that have the potential to cause the problems the MEJA was designed to solve. Thus, it becomes important to discover which host nations have abolished the death penalty and on what basis they have done so.

#### A. THE HUMAN RIGHTS TREATIES.

##### 1. The Universal Declaration of Human Rights (1948).

The Universal Declaration of Human Rights (Universal Declaration) marked the genesis of the human rights movement.<sup>146</sup> It arose in the years immediately following the Second World War, and was designed to combat the “barbarous acts which have outraged the conscience of mankind”.<sup>147</sup> The aim of the Universal Declaration is to promote “universal respect for and observance of human rights and fundamental freedoms.”<sup>148</sup>

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<sup>145</sup> See Death Penalty Information Center, *Federal Death Penalty*, available at <http://deathpenaltyinfo.org/feddp.html>, visited July 3, 2001.

<sup>146</sup> Universal Declaration of Human Rights, U.N.G.A. Res. 217 (A)(III), U.N. GAOR, 3d Sess., pt. I, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

<sup>147</sup> *Id.*, preamble at 72. See Carol Devine, HUMAN RIGHTS, THE ESSENTIAL REFERENCE, at 60 (1999) stating that “the declaration and the human rights movement that followed from it came out of the worldwide revulsion at the atrocities that were committed during World War II.”

<sup>148</sup> Universal Declaration, *supra* note 146 preamble at 72.

There is not a specific prohibition against capital punishment in the articles of the Universal Declaration, but it has become the inspiration for the more specific international instruments that followed it.<sup>149</sup>

This inspiration is taken primarily from the very general provisions of Articles 3 and 5. Article 3 states that “Everyone has the right to life, liberty and the security of person.”<sup>150</sup> Article 5 expands those rights, stating that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>151</sup> Neither of these provisions mention the words “death penalty” or “capital punishment”, but they have been viewed as a baseline for how states are to treat those facing criminal prosecution.<sup>152</sup> Thus, they set the stage for future provisions that include express prohibition of the death penalty.

The Universal Declaration is not a binding treaty, but rather is a resolution of the General Assembly of the United Nations and thus it does not have the force of law. However, parts of the Universal Declaration have become so ingrained in the international consciousness that they are viewed as customary international law.<sup>153</sup> Additionally, many of the provisions of the Universal Declaration have formed the basis of various treaties that are binding on states.

## 2. The International Covenant on Civil and Political Rights (1966) and its Second Optional Protocol (1989).

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<sup>149</sup> Eleanor Roosevelt, one of the proponents of the Universal Declaration, told the General Assembly that she hoped the Declaration would be “the Magna Carta of all mankind”. Peter Meyer, *The International Bill: A Brief History*, THE INTERNATIONAL BILL OF HUMAN RIGHTS, at XXXI (1981).

<sup>150</sup> Universal Declaration, *supra* note 146 article 3 at 72.

<sup>151</sup> *Id.*, art. 5 at 73.

<sup>152</sup> See Florencio Yuzon, *Conditions and Circumstances of Living on Death Row-Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the “Death Row Phenomenon”*, 30 GW J. Int’l L. & Econ. 39, 42 (1996).

<sup>153</sup> Devine, *supra* note 147 at 66.



One of the first treaties to pick up and echo the language of the Universal Declaration is the International Covenant on Civil and Political Rights (ICCPR).<sup>154</sup> The ICCPR, along with the Universal Declaration and the Covenant on Economic, Social and Cultural Rights, form what is known as the "Bill of Rights" for international human rights.<sup>155</sup> Article 6 of the ICCPR echoes the Universal Declaration by proclaiming "the inherent right to life" of every human being.<sup>156</sup> The ICCPR allows capital punishment but limits its application to "the most serious crimes in accordance with the law in force" and specifies that it could only be carried out after a final judgement from a competent court.<sup>157</sup> It states that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."<sup>158</sup> The ICCPR makes clear that its recognition of the right of a state to impose a death sentence is not to be read as tacit approval of capital punishment, but maintains the sovereign right of a nation to decide.<sup>159</sup>

Twenty years later, the death penalty was specifically prohibited by the ICCPR's second optional protocol.<sup>160</sup> The ICCPR Second Protocol explicitly sets out that "No one within the jurisdiction of a State Party to the present Protocol shall be executed."<sup>161</sup> It

<sup>154</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 176-77, 6 I.L.M. 368, 372-73 (1967) [hereinafter ICCPR].

<sup>155</sup> See Winston E. Langley, HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS, 1 (1992).

<sup>156</sup> ICCPR, *supra* note 154 art. 6(1), 6 I.L.M. at 370.

<sup>157</sup> *Id.*, art. 6(1), 6 I.L.M. at 370.

<sup>158</sup> *Id.*, art. 6(5), 6 I.L.M. at 370.

<sup>159</sup> *Id.*, art. 6(6), 6 I.L.M. at 370.

<sup>160</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR 3d Comm., 44th Sess., Annex, Agenda Item 98, U.N. Doc. A/44/128, 29 I.L.M. 1464 (1989) [hereinafter ICCPR Second Protocol].

<sup>161</sup> *Id.*, art. 1(1), 29 I.L.M. at 1467.

also obligated the state parties to "take all necessary measures to abolish the death penalty within its jurisdiction."<sup>162</sup>

Forty-four countries have ratified the ICCPR Second Protocol.<sup>163</sup> Of the 86,000 plus DoD civilian employees serving overseas on 30 September, 2000, over 45,000 were serving in countries that have ratified the ICCPR Second Protocol.<sup>164</sup> In addition, there were nearly 135,000 military dependents in these countries, and over 7,000 dependents of civilian employees.<sup>165</sup> This totals nearly 200,000 individuals who are subject to the MEJA in countries that have ratified the ICCPR Second Protocol.

3. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) and its Protocol No. 6 Concerning the Abolition of the Death Penalty (1985).

The European countries have been some of the most aggressive in the movement to abolish the death penalty. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is one of the earliest human rights documents.<sup>166</sup> The European Convention directly attributes its inspiration and

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<sup>162</sup> *Id.*, art. 1(2), 29 I.L.M. at 1467.

<sup>163</sup> Amnesty International indicates that as of 16 March 2001 the following countries have ratified the ICCPR Second Protocol. States parties: Australia, Austria, Azerbaijan, Belgium, Bulgaria, Cape Verde, Columbia, Costa Rica, Croatia, Cypress Denmark, Ecuador, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Leichtenstein, Luxembourg, Macedonia, Malta, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Norway, Panama, Portugal, Romania, Seychelles, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkmenistan, United Kingdom, Uruguay, Venezuela. Amnesty International, Ratifications of International Treaties on the Death Penalty, Revised March 16, 2001 (visited March 28, 2001) <http://www.web.amnesty.org/rmp/dplibrary.nsf> [hereinafter Ratifications of International Treaties]. There are seven countries that have signed the ICCPR Second Protocol, but have not yet ratified it: Bosnia and Herzegovina, Guinea-Bissau, Honduras, Lithuania, Nicaragua, Poland, Sao Tome and Principe. *Id.* The U.S. does not have a large military presence in any of those countries. There were 38 civilian employees, 82 military dependents and 25 dependents of civilian employees in those countries on 30 September, 2000. DIOR Report, *supra* note 36.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention].

heritage to the Universal Declaration.<sup>167</sup> It begins with the statement that "Everyone's right to life shall be protected by law."<sup>168</sup> However, it also initially recognizes the right of states to impose capital punishment when it was a penalty prescribed as part of a court's sentence.<sup>169</sup> Article 3 of the European Convention is also adopted the language of the Universal Declaration, stating that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>170</sup>

The European Convention also has an optional protocol (Protocol No. 6) that abolishes the death penalty.<sup>171</sup> Protocol No. 6 both condemns executions, and abolishes the death penalty for the member states.<sup>172</sup> Currently, there are thirty-nine state parties to Protocol No. 6.<sup>173</sup> There is a considerable overlap between the countries that have ratified Protocol No. 6 and those that have ratified the ICCPR Second Protocol.<sup>174</sup> Many of these countries host large U.S. military populations, which form the bulk of the U.S.'

<sup>167</sup> The European Convention articulates one of its goals as the "collective enforcement of certain of the Rights stated in the Universal Declaration." *Id.*, preamble, 213 U.N.T.S. at 224.

<sup>168</sup> *Id.*, art. 2(1), 213 U.N.T.S. at 224.

<sup>169</sup> Article 2(1) goes on stating, "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.*

<sup>170</sup> *Id.*, art. 3, 213 U.N.T.S. at 224. *See infra* notes XXXX and accompanying text discussing the *Soering* decision, which forbade the extradition of a defendant based on Article 3.

<sup>171</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. 114, entered into force Mar. 1, 1985, 22 I.L.M. 539 (1983) [hereinafter Protocol No. 6].

<sup>172</sup> "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Protocol No. 6, art.1, 22 I.L.M. at 541.

<sup>173</sup> States parties: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom. Ratifications of International Treaties, *supra* note 163. There are also three states that have signed but not ratified this protocol: Armenia, Azerbaijan, Russia. *Id.* None of these countries has a large U.S. military population, and there were only 3 civilian employees, 25 military dependents and 1 dependent of a civilian employees in those countries on 30 September, 2000. DIOR Report, *supra* note 36.

<sup>174</sup> France is the only major European country not to have ratified both treaties. It has ratified the Protocol No. 6, but is not a party to the ICCPR's Second Protocol.

overseas military presence. Thus, the numbers of individuals in these countries who are subject to the MEJA are very similar to those under the ICCPR Second Protocol.<sup>175</sup>

There were approximately 45,000 DoD civilian employees, 15,000 military dependents and 7,000 civilian dependents in Protocol No. 6 countries in September 2000.<sup>176</sup>

4. The American Convention on Human Rights (1970) and the OAS Protocol (1990).

The Organization of American States (OAS) also addressed the death penalty in the American Convention on Human Rights (OAS Convention).<sup>177</sup> The OAS Convention is consistent with the Universal Declaration and ICCPR in that it does not prohibit capital punishment, but states that "Every person has the right to have his life respected."<sup>178</sup> It is also similar to the ICCPR in stating that the death penalty "may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime."<sup>179</sup>

Like the ICCPR and the European Convention, the OAS Convention was later modified by an optional protocol (OAS Protocol) which forbids capital punishment altogether.<sup>180</sup> This protocol is a model of efficiency, with the substantive provision simply stating that "The States Parties to this Protocol shall not apply the death penalty in

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<sup>175</sup> See *supra* notes 164 and accompanying text for a list of countries that have ratified the ICCPR Second Protocol.

<sup>176</sup> DIOR Report, *supra* note 36.

<sup>177</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970).

<sup>178</sup> *Id.*, art. 4(1), 9 I.L.M. at 676.

<sup>179</sup> *Id.*, art. 4(2), 9 I.L.M. at 676. See *supra* note 157 discussing ICCPR article 6(1).

<sup>180</sup> Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Organization of American States, O.A.S.T. No. 73 (1990), adopted by Res. 1042, 20th Sess., June 8, 1990, 29 I.L.M. 1447 (1990)[hereinafter OAS Protocol].

their territory to any person subject to their jurisdiction."<sup>181</sup> The OAS Protocol has eight state parties.<sup>182</sup> The U.S. does not have a large military presence in the OAS states, and there are few individuals subject to the MEJA serving in those countries.<sup>183</sup>

#### B. HUMAN RIGHTS TREATIES AND DEATH PENALTY CASES

These human rights treaties will make rendition of suspects who face a possible death penalty under the MEJA much more complex. One possible scenario is that the host nation will simply deny the request for extradition or removal.<sup>184</sup> The defendant could also invoke the courts of the host nation to block his extradition,<sup>185</sup> or raise a claim to the administrative or judicial bodies of the various treaties in a similar attempt to stop a planned extradition.

The court that has been the most active and influential in this area is the European Court of Human Rights. This court was established by the European Convention as one of the enforcement mechanisms for the Convention.<sup>186</sup> This court has been very influential in large part because its decisions are binding on the member nations.<sup>187</sup> This is a significant power for the court and separates its opinions from those of the Human

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<sup>181</sup> *Id.*, art. 1, 29 I.L.M. at 1448.

<sup>182</sup> States parties: Brazil, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay, Venezuela. Ratifications of International Treaties, *supra* note 163. There are no signatories that have not ratified the protocol. *Id.*

<sup>183</sup> DIOR Report, *supra* note 36. There were 12 civilian employees, 105 military dependents and 5 dependents of civilian employees in those countries on 30 September, 2000.

<sup>184</sup> See e.g. Model Treaty *supra* note 139 at, art. 4.

<sup>185</sup> See *infra* Section IV(B)(1) and (2) discussion the host nation court's decisions in the *Soering* and *Short* cases.

<sup>186</sup> See European Convention, *supra* note 166, article 19, 213 U.N.T.S. at 234. Article 19 creates the European Court of Human Rights, as well as the European Commission of Human Rights. See also *id.*, arts. 20-56, 213 U.N.T.S. at 234-48, setting out the functions and duties of both institutions.

<sup>187</sup> *Id.*, art. 46, 213 U.N.T.S. at 240. It should once again be noted that the member nations of the European Convention include virtually all of the large industrialized nations of Eastern Europe, which also adds significant value to the decisions of the European Court. See *supra* note 173 for the membership of the protocol.

Rights Committee.<sup>188</sup> Another reason for its influence is the court has had the opportunity to decide a number of cases dealing with extradition and human rights, and thus it has led the development the law regarding human rights and extradition.

The OAS created the Inter-American Court of Human Rights as part of its Convention on Human Rights.<sup>189</sup> The parties also have to submit a special acceptance of the jurisdiction of this court.<sup>190</sup> An individual cannot take a case directly to the court, but must first go to the Commission, which can then submit the case to the court if it wishes.<sup>191</sup> This court has not decided any cases that directly deal with extradition and the death penalty; however, there have been instances where the host nation has refused to extradite suspects if there is the potential that the death penalty will be imposed.<sup>192</sup>

Neither the Universal Declaration, nor the ICCPR, created judicial bodies that bind their member states by judicial decisions.<sup>193</sup> There have been several complaints that have been brought before the ICCPR's Human Rights Committee; however, their

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<sup>188</sup> See Markus G. Schmitt, *Universality of Human Rights and the Death Penalty: The Approach of the Human Rights Committee*, 3 ILSA J. INT'L & COMP. L. 477 (1997) discussing the nature of the decisions of the Human Rights Committee.

<sup>189</sup> OAS Convention, *supra* note 177, article 52, 9 I.L.M. 690.

<sup>190</sup> *Id.*, art. 62, 9 I.L.M. 691-2.

<sup>191</sup> *Id.*, art. 61, 9 I.L.M. 691.

<sup>192</sup> See Manuel Somoza, *Castro Says no Death Penalty for Alleged Assassination Plotters if Extradited*, AGENCE FRANCE PRESSE, Monday December 4, 2000, reporting that Fidel Castro had passed guarantees to Panamanian officials that the death penalty would not be considered as an option if four suspects were extradited to Cuba. The four were suspected of plotting an assassination attempt against Castro. Panama is a member of both the ICCPR Second Protocol and the OAS Protocol No.6, although Cuba is not a party to either treaty.

<sup>193</sup> See *supra* notes 146-153 and accompanying text regarding the Universal Declaration, and notes 154-165 and accompanying text regarding the ICCPR. The Declaration was not a treaty and did not create any kind of implementing body. The ICCPR created the Human Rights Committee. ICCPR, *supra* note 154, article 28, 6 I.L.M. 376. However, member states have to make a specific recognition of the competence of the Committee, and even if the state recognizes the Committee's competence, the Committee has no direct enforcement powers over the parties. *Id.*, art. 41, 6 I.L.M. 378.

decisions are neither binding nor precedential and thus have not had the same impact on this area of law as the European Court of Human Rights.<sup>194</sup>

1. *Soering v. United Kingdom*.

The *Soering* case is the seminal decision regarding the relationship between the death penalty and extradition.<sup>195</sup> It demonstrates quite vividly the way that the national courts, as well as the various treaty courts and committees, can get involved in an extradition case, and how they are likely to get involved in requests for extradition under the MEJA. Jens Soering was a German national, who was living in the U.S. and attending school at the University of Virginia. In March 1985, Soering and his girlfriend, Elizabeth Haysom, came up with a plot to kill her parents because they did not approve of the couple's relationship. While Haysom set up an alibi, Soering went to her parents' home and killed both of them with a knife. Soering and Haysom then fled to the United Kingdom.<sup>196</sup>

In April 1986 the two were arrested in England in connection with a check fraud case, and during the questioning Soering admitted to having killed Haysom's parents in Virginia. He was indicted by a grand jury in Virginia on charges of capital murder, and the U.S. requested the extradition of Soering and Haysom to stand trial.<sup>197</sup> The British Embassy in Washington asked for an assurance that the death penalty would not be imposed or executed.<sup>198</sup> The attorney for the county in Virginia where Soering was

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<sup>194</sup> See Markus G. Schmitt, *supra* note 188 discussing the decisions of the Human Rights Committee that have dealt with the death penalty.

<sup>195</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), 28 I.L.M. 1066 (1989).

<sup>196</sup> *Id.*, at 28 I.L.M. 1071.

<sup>197</sup> *Id.*, at 28 I.L.M. 1071-72.

<sup>198</sup> Imposition of the death penalty occurs at the time the sentence to death is announced, whereas the sentence is executed when the prisoner is actually put to death. See *supra* note 143 discussing the number of federal prisoners at the various stages of the death penalty process. The *Soering*

indicted certified that if Soering were convicted of a capital offense, a representation would be made to the judge that the United Kingdom did not want the death penalty to be imposed or carried out. However, he refused to make a blanket promise that Soering would not be subject to the death penalty.<sup>199</sup>

Soering initially applied to the British trial court for a writ of habeas corpus claiming that the U.S.' assurances did not meet the "satisfactory" test of the extradition treaty.<sup>200</sup> The claim was denied as premature because the Secretary of State had not yet decided whether to accede to the requested extradition. Soering then went to the House of Lords in an attempt to appeal the trial court's decision, but was rejected there as well. His next appeal was to the Secretary of State, asking him to deny the request for extradition; however, the Secretary did sign a warrant ordering Soering's extradition.<sup>201</sup>

At the same time, Soering was pressing his case with the European Commission.<sup>202</sup> The Commission put a hold on his extradition and the case came before the European Court. The case would have been fairly simple under Protocol No. 6, which abolished the death penalty. However, the court decided the case under Article 3 of the European Convention<sup>203</sup> because England had not yet ratified Protocol No. 6.<sup>204</sup> Thus, the opinion of the majority of the court decided the case on the "Death Row Syndrome" as a violation of Article 3's prohibition on torture or degrading punishment

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court required that the assurances be that the death penalty would not even be imposed rather than just that the sentence would not be carried out.

<sup>199</sup> *Id.*, at 28 I.L.M. 1074.

<sup>200</sup> *See supra* note 141, setting out the U.S.-U.K. extradition treaty provisions regarding the death penalty.

<sup>201</sup> *Soering*, 28 I.L.M. at 1075.

<sup>202</sup> *Id.*, at 28 I.L.M. 1069.

<sup>203</sup> European Convention, *supra* note 166, art. 3, 213 U.N.T.S. at 224, stating that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

<sup>204</sup> *Soering*, 28 I.L.M. at 1097.



rather than the death penalty itself.<sup>205</sup> Their holding was essentially that the conditions of imprisonment for long periods while waiting for the sentence to be executed constituted a violation of Article 3.<sup>206</sup>

The Privy Counsel decided a similar case in *Pratt and Morgan v. the Attorney General for Jamaica and the Superintendent of Prisons, Saint Catherine's Jamaica*.<sup>207</sup> In *Pratt and Morgan*, the Privy Counsel essentially followed the *Soering* decision by holding that any delay in execution of over five years from the date of sentence constituted a violation of Article 17(1) of the Jamaican Constitution.<sup>208</sup>

The impact of *Soering* has been muted by recent developments. The first is the adoption of the protocols eliminating the death penalty. The influence of the death row syndrome has been considerably reduced because virtually all of the European countries have signed Protocol No. 6.<sup>209</sup> Thus, most future cases will hinge on the death penalty itself as a violation of the protocol rather than the death row syndrome and Article 3. It is possible to argue both a violation of the protocol and Article 3 at the same time; however, recent cases have made the death row syndrome much more difficult to prove.

The UNHRC has essentially limited *Soering* to its facts in its *Kindler* decision.<sup>210</sup> In *Kindler*, the UNHRC distinguished *Soering*, because not all of the same factors the court considered in *Soering* were present.<sup>211</sup> Thus, the burden of proof for a complainant

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<sup>205</sup> See *infra* notes 210-213 and accompanying text discussing the impact of the death row syndrome cases on removal under the MEJA.

<sup>206</sup> *Soering*, 28 I.L.M. at 1097.

<sup>207</sup> 33 I.L.M. 364.

<sup>208</sup> *Id.*, at 387. Article 17(1) provides "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." *Id.*, at 377.

<sup>209</sup> See *supra*, note 172 listing the signatories to Protocol No. 6..

<sup>210</sup> *Kindler v. Canada* (No. 470/1991), UN Doc. A/48/40, Vol II, p. 138, views adopted on July 30, 1993, 14 HUM. RTS. L. J. 307 (1993).

<sup>211</sup> *Id.*, at 314.

is much lower in regard to the death penalty than the death row syndrome. A complainant who files a complaint under Protocol No. 6 only has to show that the death penalty is an option for the charged offense. By contrast, a complainant alleging death row syndrome must prove a laundry list of factors under the death row syndrome cases.<sup>212</sup>

The biggest impact of the *Soering* decision is in the primacy it gave to the human rights considerations over the country's international obligations under an extradition treaty. That impact has been extended to giving primacy to domestic laws and constitutions over international extradition treaties as well.<sup>213</sup>

Another area where the *Soering* decision has been influential is in the concurring opinion of Judge De Meyer.<sup>214</sup> Judge De Meyer's opinion is very instructive because he based it on the death penalty directly, rather than the death row syndrome.<sup>215</sup> In his analysis of the death penalty, Judge De Meyer gave little deference or margin of appreciation to the decision of Great Britain's Secretary of State. Although Great Britain had not yet ratified Protocol No. 6, it had abolished the death penalty for crimes similar to *Soering's*, and thus were proceeding under the provisions of the extradition treaty for such circumstances.<sup>216</sup> The U.S. had given "assurances" regarding the imposition of the death penalty, and Great Britain's Secretary of State had decided that the assurances were

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<sup>212</sup> The UNHRC set out the following criteria for death row syndrome cases. "In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the [complainant], the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent." *Id.*, at 314.

<sup>213</sup> See *supra* Section IV(C), discussing the *Venezia* decision. See also John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 A.J.I.L. 187, 194 (1998) discussing Ireland's decisions not to extradite fugitives because various aspects of those cases would violate the Irish Constitution.

<sup>214</sup> *Soering*, 28 I.L.M. at 1107.

<sup>215</sup> *Id.*

“satisfactory”.<sup>217</sup> However, Judge De Meyer did not even look into whether that determination was reasonable. Rather, he laid out what appears to be an absolute test for extradition that does not consider the “satisfactory assurances” test of the extradition treaty:

The applicant’s surrender by the United Kingdom to the United States could only be lawful if the United States were to give absolute assurances that he will not be put to death if convicted of the crime he is charged with.<sup>218</sup>

Judge De Meyer based his analysis on the assumption that the mere possibility of a death sentence being imposed constitutes a violation of the right to life,<sup>219</sup> found in Article 2 of the Convention.<sup>220</sup> Article 2 does not abolish the death penalty, and in fact explicitly permits the death penalty to be carried out pursuant to a conviction “of a crime for which this penalty is provided by law.”<sup>221</sup> However, Judge De Meyer found that because Great Britain had abolished the death penalty, the penalty was no longer “provided by law” under Article 2. Thus, he concluded that Soering’s right to life would be violated if the extradition took place.

The *Soering* decision lays the foundation for the decisions in the later cases that deal with the death penalty directly. *Soering* clearly established the relevance of human rights considerations in extradition actions. It also demonstrates that a requested extradition under the MEJA from a host nation that is a member of the European

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<sup>216</sup> *Id.*, at 1074, 1076.

<sup>217</sup> *Id.*, at 28 I.L.M. 1075.

<sup>218</sup> *Id.*, at 28 I.L.M. 1108.

<sup>219</sup> *Id.*, at 28 I.L.M. 1107, 1108, finding,

Indeed, the most important issue in this case is not ‘the likelihood of the feared exposure of the applicant to the “death row phenomenon”’, but the very simple fact that his life would be put in jeopardy by the said extradition. . . . In these circumstances there can be no doubt whatsoever that the applicant’s extradition to the United States would violate his right to life.

<sup>220</sup> See *supra* notes 168, setting out the text of article 2(1).

<sup>221</sup> *Soering*, 28 I.L.M. at 1107.

Convention will require an absolute waiver of the death penalty before the request is granted.

2. *Short v. Kingdom of the Netherlands.*

The case of *Short v. Kingdom of the Netherlands*<sup>222</sup> is in many cases the closest analogue to how a death penalty extradition under the MEJA is likely to play out in practice. This is because Short committed the crime in the host country, as opposed a situation where the defendant has simply fled to the host country after committing the crime elsewhere. This additional contact with the host country will also have a significant impact in the negotiations for extradition under the MEJA, because the host nation will have the option of prosecuting the offense. The *Short* case also demonstrates that in most circumstances the host country's obligations under their human rights treaties will be seen as superior to their obligations under the SOFAs.

Short was an American sergeant who was stationed in the Netherlands. On March 30, 1988, he was arrested by the Dutch authorities as a suspect for the murder of his wife. He confessed to having killed her, cut her body into pieces, and leaving her remains in plastic bags at various locations along a dike.<sup>223</sup>

Short's Dutch defense counsel obtained an order from the Dutch civil trial court that he was not to be released to the Americans until the Dutch authorities either received a waiver of jurisdiction from the Americans or assurances that the Americans would not impose the death penalty. The U.S. authorities refused to give such assurances or to waive jurisdiction, citing the NATO SOFA which gave the sending state primary

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<sup>222</sup> Nos. 13.949, 13.950, excerpted and translated in 29 I.L.M. 1388 (1990).

<sup>223</sup> John E. Parkerson, Jr. & Steven J. Lepper, *Jurisdiction -- NATO Status of Forces Agreement - U.S. Servicemen Charged with Criminal Offenses Overseas -- European Convention on Human*

jurisdiction over their military forces.<sup>224</sup> The U.S. authorities also cited the Dutch obligation to turn Short over under the NATO SOFA.<sup>225</sup>

This created a conflict between treaty obligations for the Dutch. On the one hand the NATO SOFA required them to turn Short over to the Americans; however, to do so would be a violation of their obligations under Protocol No. 6.<sup>226</sup> At the same time the civil court was refusing to turn Short over to the U.S., a Dutch criminal trial court proceeded to try Short, convict him of manslaughter, and sentence him to six years of confinement.<sup>227</sup> Both the civil and the criminal decisions were appealed to their respective appeals courts. The criminal appellate court reversed the conviction, finding that the Dutch lacked authority to hear the case because the U.S. had primary jurisdiction.<sup>228</sup>

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*Rights*, 85 A.J.I.L 698, 699 (October, 1991) (citing Serious Incident Report Message from 32TFS/JA to HQ USAF/JACI (Mar. 31, 1988).

<sup>224</sup> NATO SOFA, *supra* note 46, article VII(3)(a)(i), 4 U.S.T. at 1801, stating:

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

- (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
  - (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent.

<sup>225</sup> *Id.*, art. VII(5)(a), 4 U.S.T. at 1802, stating "The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."

<sup>226</sup> See *Opinion of the Advocaat-Generaal and Supreme Court Decision in the Netherlands v. Short*, 29 I.L.M. 1378, 1384 (1990) stating, "The foregoing leads to the conclusion that in the present case the State faces indeed two incompatible treaty obligations. Based on art. VII of the NATO Status Treaty the State is obligated to hand over Short to the military authorities of the U.S., while the European Convention and the Sixth Protocol related thereto obligate the State to refrain from handing him over."

<sup>227</sup> Parkerson & Lepper, *supra* note 223 at 700.

<sup>228</sup> *Id.*

The civil case went to the High Court (Hoge Raad). While the High Court did not specifically find that Protocol No. 6 trumped the NATO SOFA obligations, they did find that Short's interest should prevail over the Government's interest in complying with the NATO SOFA by turning him over.<sup>229</sup> This created the curious situation where the civil court stated Short could not be turned over, but the criminal appeals court said that the Dutch did not have authority to try him themselves. Ultimately, Short was in fact surrendered to the U.S. military for court-martial, after the U.S. authorities promised not to charge him with a capital offense.<sup>230</sup>

While the Dutch did not explicitly hold Protocol No. 6 as a superior treaty obligation, they also clearly did not find the NATO SOFA to be superior to Protocol No. 6. The fact that the Dutch would rather have a confessed killer in their midst than turn him over to face a potential death penalty speaks volumes to how they viewed their treaty obligations and how they viewed the death penalty. This case demonstrates the strength of the human rights treaties relative to other treaty obligations, and is a step beyond *Soering*. The European Court of Human Rights did not deal with the sufficiency of the U.S.' offer regarding the death penalty in their *Soering* decision.<sup>231</sup> However, the *Soering* case has been taken for the proposition that a firm guarantee that the death

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<sup>229</sup> John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 A.J.I.L. 187, 193 (1998).

<sup>230</sup> *Id.* He was convicted by a court-martial, and sentenced to life imprisonment, which was reduced to 45 years pursuant to a pre-trial agreement. *United States v. Short*, 1993 CMR LEXIS 315, (AFCMR 1993).

<sup>231</sup> See *Soering*, 28 I.L.M. at 1102, holding that the court did not have jurisdiction to evaluate *Soering's* complaint regarding the Secretary of State's ultimate decision to extradite him because it was not filed on time. See also, *supra* note 199 and accompanying text for the U.S.'s submissions regarding the imposition of the death penalty in the *Soering* case.

penalty will not be imposed is required prior to extradition. Requiring this level of guarantee was not directly contrary to the extradition treaty that was in force.<sup>232</sup>

The *Short* decision went one step further by applying Protocol No. 6 in a situation where it was directly contrary to another treaty.<sup>233</sup> This is a significant step in establishing the primacy of human rights over other agreements. It is also important to note that the court giving human rights that primacy was a national court, rather than the European Court of Human Rights which was created to enforce the Convention.<sup>234</sup> While it might be presumed that a court of human rights would give primacy to those rights over other considerations, the fact that a national court found that human rights outweighed its obligations under the NATO treaty is significant. U.S. will typically be dealing with national courts to effect an extradition under the MEJA. The willingness of national courts to view human rights as a priority over extradition treaties will be seen in other cases as well.<sup>235</sup>

The *Short* case also demonstrates the willingness for the host country's courts to assume criminal jurisdiction for the crime in order to avoid the extradition issue entirely. In *Short*, the criminal appeals court found that the SOFA gave primary jurisdiction to the U.S., and thus the domestic criminal court lacked authority to try the case.<sup>236</sup> That will not be the case for most prosecutions under the MEJA. The NATO SOFA gives the host

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<sup>232</sup> See *supra*, notes 141 and accompanying text regarding the treaty's requirement for sufficient assurances that the death penalty will not be imposed.

<sup>233</sup> See *supra*, note 226 and accompanying text, discussing the conflict between the treaty obligations.

<sup>234</sup> See *supra*, note 186 and accompanying text, discussing the creation of the court.

<sup>235</sup> See *infra* Section IV(C).

<sup>236</sup> See *supra*, note 231 and accompanying text.

nation primary jurisdiction for offenses committed by civilians in their jurisdiction.<sup>237</sup>

Additionally, the MEJA itself gives the host nation the first opportunity to take jurisdiction over cases arising in their jurisdiction.<sup>238</sup> Thus, a country that does not wish to deal with the extradition issue can simply assert its own jurisdiction over the individual, and sidestep the issue entirely.

### C. NATIONAL CONSTITUTIONS AND THE DEATH PENALTY: *VENEZIA*

The host country's national courts have many other factors to consider in dealing with a request to extradite a suspect who may be subject to the death penalty. In addition to the human rights treaties, national constitutions can create human rights and can impact the extradition decision.

The most significant of the constitutional cases arose in Italy, in *Venezia v. Ministero di Grazia e Giustizia*.<sup>239</sup> Venezia was an Italian national who owned a restaurant in Miami, Florida. He got into trouble with the local tax authorities over delinquencies in his tax bills of over \$41,000. One of the Florida tax enforcement officers signed a notice of action against Venezia, freezing his assets. When Venezia received the notice, he tracked the official down and killed him.<sup>240</sup>

Venezia then fled the country, and returned to his boyhood home in Italy. The Italian police found him there, and after being apprehended he confessed to killing the

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<sup>237</sup> NATO SOFA, *supra* note 46 article VII(3)(b), 4 U.S.T. 1792, 1801, stating, "In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction." This article references article VII(3)(a), giving the sending nation's military authorities primary jurisdiction over certain offenses. Because the U.S.'s military authorities do not have jurisdiction over civilians, that article would not apply.

<sup>238</sup> See *supra*, notes 106-113 and accompanying text discussing how the MEJA gives the host nation primary jurisdiction.

<sup>239</sup> Judgment No. 223. 79 *Rivista di Diritto Internazionale* 815 (1996). Italian Constitutional Court.



agent.<sup>241</sup> The U.S. requested his extradition to try him for the murder, giving assurances that “the death penalty will not be imposed or inflicted upon Mr. Venezia for his offense.”<sup>242</sup> This second request was approved when the Justice Minister found that these assurances were sufficient under the extradition treaty.<sup>243</sup>

Venezia then started a series of appeals in an attempt to block his extradition. He appealed unsuccessfully to the Italian Court of Cassation (civil court), and also filed an appeal with the European Commission on Human Rights.<sup>244</sup> Ultimately, his case came before the Italian Constitutional Court. The Constitutional Court held that the extradition treaty was unconstitutional in regard to the death penalty.<sup>245</sup> The court based its decision

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<sup>240</sup> See, Mark E. DeWitt, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 Cath. U. L. Rev. 535, 567 (1998) citing Arnold Markowitz, *Pasta to Die For?*, MIAMI HERALD, May 29, 1994, at 6.

<sup>241</sup> *Id.*

<sup>242</sup> See Andrea Bianchi, *Venezia v. Ministero di Grazia e Giustizia*, 91 A.J.I.L 727, 728 note 5, (1997) quoting note verbale 684 from the U.S. Embassy, August 24, 1995. Bianchi notes that this was the second note verbale, because a first stating “the death penalty will not be carried out if Mr. Venezia is convicted” was deemed insufficient by the Italian Court of Cassation. *Id.*

<sup>243</sup> Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 Cap. Def. J. 243, 254 (1999). The relevant provisions are found at Extradition Treaty, Oct. 13, 1983, U.S.-Italy, TIAS No. 10,837, 24 I.L.M. 1525 (1985)(entered into force Sept. 24, 1984). This treaty incorporated the standard language that “when the offense for which extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be refused, unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.” *Id.* at Article IX.

<sup>244</sup> See, Bianchi *supra* note 242 at 727. The decision of the European Commission on Human Rights is found at *Venezia v. Italy*, App. No. 29966/96, Eur. Comm’n H.R. (Oct. 21, 1996).

<sup>245</sup> The opinion specifically dealt with Articles 2 and 27 of the Italian Constitution. See, Bianchi *supra* note 242 at note 2 stating, “Article 2 reads: ‘The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression and imposes the performance of unalterable duties of a political, economic and social nature.’ Article 27, paragraph 4 states: ‘The death penalty is not admitted save in cases specified by military laws in time of war.’ COST. Arts 2, 27(4), *trans. In* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Albert P. Blaustein & Gilbert H. Flanz eds., 1987. The death penalty was also abolished in military law by Article 1 of Act No. 589, Oct. 13, 1994.”

on the concept that the right to life required absolute protection, and that it should not be subject to the decisions of politicians on a case-by-case basis.<sup>246</sup>

The court found the assurances from the U.S. to be irrelevant, because they were subject to the discretion of the authorities and therefore not absolute.<sup>247</sup> However, the court indicated that non-discretionary methods of ensuring that the death penalty would not be imposed would be constitutional. One such method would be similar to the extradition treaty between Italy and Morocco, where Morocco agreed to substitute the Italian penalty for any cases where they requested extradition of a defendant from Italy.<sup>248</sup> Other non-discretionary methods that would satisfy the Italian constitution might include enacting legislation, executive agreement, or if a judicial order were entered in a specific case.<sup>249</sup>

This case stands for the basic proposition that the U.S. will likely encounter difficulty in attempting to secure the extradition from Italy of a defendant under the MEJA who commits an offense that could be punished by the death penalty. The *Venezia* decision indicates that mere assurances that the death penalty will not be imposed will probably not be deemed sufficient to make the extradition legal under the Italian constitution.<sup>250</sup>

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<sup>246</sup> *Id.*, at 728.

<sup>247</sup> See Martin, *supra* note 243 at 255.

<sup>248</sup> See Bianchi, *supra* note 242 at 729.

<sup>249</sup> See DeWitt, *supra* note 240 at note 201.

<sup>250</sup> However, the Italians did undertake to prosecute Venezia themselves. The Italian Constitutional Court emphasized that, under Article 9(3) of the Italian Code of Criminal Procedure, it is incumbent on the Italian authorities to prosecute the case when extradition is denied. See Bianchi, *supra* note 233 at note 22. The prosecution of the case was complicated because many of the witnesses were in the United States. The countries came to an interesting compromise to assure a full hearing in this case. Evidence in the case was heard under Italian law, but the evidentiary hearing was conducted in Miami, Florida, while the closing arguments, deliberations and verdict took place in Italy. See *Italian Criminal Trial for Italian National Accused of Murdering American is Conducted Mainly in the U.S. but Under Italian Law*, INT'L

However, there is one distinguishing feature of the *Venezia* case that is unlikely to appear with a MEJA prosecution: Venezia was an Italian citizen. The Italian Constitution only specifically deals with extradition of citizens.<sup>251</sup> The MEJA specifically excludes jurisdiction over host nation nationals,<sup>252</sup> so any extradition issue that arises in Italy under the MEJA would necessarily involve a non-Italian. It is possible that the Italian Constitutional Court would allow the extradition of a non-Italian under the MEJA if the U.S. gave absolute assurances against the death penalty. This case has not come up, and it is unclear how the Italian Constitutional Court would rule on such an issue.

It is quite likely that this type of case will arise under the MEJA. Italy has a large U.S. military presence, with all of the civilians, contractors and dependents that go along with the military. In September 2000, there were nearly 18,000 individual who are subject to the MEJA in Italy.<sup>253</sup>

#### D. CURRENT EXTRADITION CASES

Although the *Soering*, *Short* and *Venezia* cases are watershed decisions regarding the death penalty and extradition, they are not isolated incidents. These cases have set the standards regarding extradition, and additional cases are arising on a regular basis.<sup>254</sup>

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ENF. L. REP., Vol. 14, No. 7, Sec. IV (1998). He was convicted by a panel of eight Italian judges, and sentenced to twenty-three years in jail and a \$200,000 fine. See, *Restauratuer is Convicted of Killing Tax Collector*, FORT LAUDERDALE SUN-SENTINEL, June 26, 1998, Pg. 3B.

<sup>251</sup> Article 26 of the Italian Constitution provides that, "The extradition of a citizen may be permitted only in such cases as are expressly provided for in international conventions." CONST. Art 26, trans. in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Albert P. Blaustein & Gilbert H. Flanz eds., 1987.

<sup>252</sup> 18 U.S.C. § 3267(1)(C).

<sup>253</sup> DIOR Report, *supra* note 36.

<sup>254</sup> See e.g., Hugh Muir, *Malta to Extradite Murder Suspect*, THE EVENING STANDARD, June 4, 2001, pg. 18 (Muhammed Aly was extradited from Malta only after Turkey waived death penalty in case of the murder of a British tourist); Richard Ford, *Extradition Man Freed*, THE TIMES (London), March 14, 2001, Home News (Mohammed Lodhi was released after the High Court in London found the evidence insufficient to extradite him to the United Arab Emirates on

Cases where extradition is denied because of a potential death penalty, or where assurances that the death penalty will not be imposed, are too common to create an exhaustive list. On the other hand, some of the more infamous cases have attracted the attention of the world media.

#### 1. Einhorn

Ira Einhorn was a new age “counterculture guru” who killed his girlfriend and left her body parts in a steamer trunk in his apartment.<sup>255</sup> Einhorn fled the U.S. in 1981, two weeks before his trial, and began living in France under an alias.<sup>256</sup> A jury convicted him in absentia, and he was sentenced to life in prison.<sup>257</sup> He was discovered three years ago, and the U.S. has been attempting to secure his extradition ever since.

The first legal hurdle to his return was that the French do not recognize trials in absentia, and thus they would not extradite him to serve his life sentence.<sup>258</sup> Thus, the U.S. would have to re-try him for the murder charge. In fact, the Pennsylvania State Assembly passed special legislation that would allow persons convicted in absentia to receive a new trial.<sup>259</sup> The second problem was that the French would not extradite Einhorn if he faced a potential death penalty. Pennsylvania agreed to waive the death

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drug charges. Lodhi had fought the extradition on the death penalty issue claiming that he faced crucifixion if extradited); *Gangster Extradited to Turkey*, DEUTSCHE PRESSE-AGENTUR, Dec. 14, 1999, State and Regional (Turkey secured the extradition of one of its most wanted crime bosses from France by dropping a murder charge and thereby eliminating the possibility of a death sentence).

<sup>255</sup> Susan Taylor-Martin, *France May Learn that Extradition Can Cut Both Ways*, ST. PETERSBURG TIMES, April 25, 2001, pg. 2A.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *US Murder Fugitive in Final Appeal Against French Extradition Order*, AGENCE FRANCE PRESSE, Dec. 8, 2000.

penalty, and a French court ruled that he should be extradited,<sup>260</sup> but the appeals have continued for over two years with no resolution in sight.<sup>261</sup>

## 2. Kopp

James Kopp is on the FBI's "10 Most Wanted" list for the 1998 murder of Dr. Barnett Slepian.<sup>262</sup> Kopp was apprehended in France in March 2001 after apparently fleeing to Ireland, the United Kingdom, and finally France.<sup>263</sup> The U.S. Embassy forwarded a diplomatic note to the French promising not to impose the death penalty, but Kopp's attorney's challenged the sufficiency of such guarantees.<sup>264</sup> This led the U.S. Attorney General to personally guarantee that the prosecutors would not pursue the death penalty for Kopp if he were convicted.<sup>265</sup> It was only after the French received the person guarantee of the Attorney General that they agreed to extradite Kopp to the U.S. to stand trial. This is certainly a step beyond the absolute guarantees required by *Soering*.

## E. OTHER OPTIONS FOR REMOVAL

There may be options for the removal of a MEJA suspect other than a full extradition hearing. Other options would include negotiating a separate agreement with the host nation for removal of suspects without a full extradition proceeding, or other methods of informal rendition. However, the issue of the death penalty will arise regardless of the method of removal, or the term that is used to describe it. Whether it is

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<sup>260</sup> *Activist's Extradition from France Set*, FACTS ON FILE WORLD NEW DIGEST, Feb. 25, 1999, p. 130, E1.

<sup>261</sup> *See supra* Taylor-Martin, *supra* note 255.

<sup>262</sup> Andy Geller, *U.S. to get Abort-Doc Slay Suspect*, THE N.Y. POST, June 29, 2001, pg. 20.

<sup>263</sup> Keith Richburg, *France Oks Extradition of Murder Suspect*, THE CHI. TRIB., June 29, 2001, pg. 4.

<sup>264</sup> Charles Bremmer, *Abortion Extremist to Face US Justice*, THE TIMES (London), June 29, 2001, Overseas News.

<sup>265</sup> *Id.*

referred to as removal, rendition, extradition or just sending the person home, the death penalty will have to be addressed.

A good example would be where a DoD civilian murders someone overseas. Generally, the crime will be committed on foreign soil so the host nation will be aware of it. Many times the local investigators will be the lead law enforcement agency, and will often be the agency to take the suspect into custody.<sup>266</sup> The host nation then has the opportunity to assert their primary jurisdiction.<sup>267</sup> If the host nation does not prosecute, the U.S. will have to request that the host nation to turn the suspect over so that it can prosecute the murder under the MEJA. It will make virtually no difference whether the U.S. frames the request in a formal request for extradition, or if it simply ask the local authorities to give us the suspect informally.<sup>268</sup> If the host nation would violate its international human rights obligations by turning over a suspect who might face the death penalty, the issue will have to be dealt with.<sup>269</sup>

The possible exception would be a situation where the murder was committed on base, the victim was a U.S. national, and the suspect was caught red-handed by U.S. authorities without any local involvement. In this scenario there is at least a possibility that the U.S. could send the person back home without the local authorities even knowing about it. However, the MEJA requires an initial hearing prior to a suspect's removal.<sup>270</sup> The suspect has the right to representation at this hearing, and the odds are great that an

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<sup>266</sup> This was precisely the situation the U.S. military found itself in with *Short*. See *supra* notes 222-238 and accompanying text analyzing the *Short* decision.

<sup>267</sup> See *supra* notes 106-113 and accompanying text describing the primary jurisdiction of the host nation.

<sup>268</sup> *Short* was not a request for extradition, but rather simply a request that the Dutch authorities turn him over for a court-martial pursuant to their obligations under the NATO SOFA. See *supra* note 225 and accompanying text.

<sup>269</sup> *Id.*

attorney practicing in this area will be aware of the cases dealing with the death penalty and follow the lead of Short's attorney. Competent counsel will try to get the host nation to assert its primary jurisdiction, and file appeals with every human rights organization that has any influence in the host country in an attempt to avoid removal if the client would face a potential death sentence in the U.S..

Even if the U.S. were successful in surreptitiously removing an individual from the host country to avoid the death penalty issue, it is likely to come up at trial and be brought to the attention of the host nation.<sup>271</sup> The method of rendition will probably not be a bar to the prosecution under the MEJA,<sup>272</sup> but the fact that the U.S. has not complied with the provisions of the MEJA by allowing the host nation to exercise its primary jurisdiction will certainly be an issue. It will be very difficult for the U.S. to negotiate the removal of future suspects, whether they involve the death penalty or not, if the U.S. has previously engaged in this type of deception.<sup>273</sup> Essentially, there is not going to be a way to avoid the death penalty issue regardless of the method of removal that is used.

#### F. LIFE IMPRISONMENT

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<sup>270</sup> 18 U.S.C. § 3264.

<sup>271</sup> It can be assumed that a federal prosecution for any crime with a possible death sentence that is tried under the MEJA will attract at least some press interest. Once the press discovers that the removal was gained surreptitiously it is a virtual certainty that the host nation will become aware of it as well.

<sup>272</sup> See *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that the method of rendition did not defeat the jurisdiction of the court, even in a situation where the defendant was forcibly abducted from a foreign country without that country's permission).

<sup>273</sup> The U.S. would not have caused the host nation to violate its human rights obligations under International law because the host nation would not have known about the removal. However, most states that have abolished the death penalty take the issue quite seriously. See *supra* notes 239-253 and accompanying text describing the *Venezia* decision. Additionally, the U.S. will have at least violated its own obligations under the MEJA to allow the host nation to exercise primary jurisdiction over the case. See *supra* notes 106-113 and accompanying text for the MEJA provisions regarding host nation primacy.

While the death penalty is the most highly publicized human rights issue that has impacted extradition, another concern that may arise in an attempted extradition under the MEJA involves life imprisonment. There has not yet been a strong movement in European countries to abolish life imprisonment, but it has had an influence in Latin America. The OAS Protocol, which prohibits extradition to face the death penalty, also prohibits extradition if the suspect will face life imprisonment.<sup>274</sup>

This prohibition has not been an issue in the past, as there have not been any cases where the Inter-American Court of Human Rights has denied extradition based on this provision. Neither are there any cases that would indicate whether this provision would only apply to sentences of life imprisonment without the possibility of parole or not. Additionally, it is not clear whether assurances that life imprisonment would not be imposed would be sufficient, or whether some other guarantees would be required to secure extradition in such a case.<sup>275</sup> The U.S. has a relatively small military presence in Latin America, and there are not many individuals subject to the MEJA stationed in OAS countries.<sup>276</sup> Thus, while this is a potential issue that could limit the U.S.' ability to secure the extradition of a defendant under the MEJA, at this point it is only a potential issue and is unlikely to arise in the near term.

## V. THE PROBABLE EFFECTIVENESS OF THE MEJA

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<sup>274</sup> Inter-American Convention on Extradition, Article 9, O.A.S. Document OEA/her.A/36 (SEPF), 20 I.L.M. 723 (1981), stating:

Penalties Excluded The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.

<sup>275</sup> See *supra*, notes 248 and accompanying text, discussing the legal provisions that the Italian Constitutional Court felt might be appropriate to make an extradition constitutional.

<sup>276</sup> See *supra*, note 183 and accompanying text.



The effectiveness of the MEJA will be judged on its ability to meet the goals for the legislation that were discussed previously.<sup>277</sup> Implementation of the MEJA will have to ensure that an offender does not escape punishment for the crime. It will also have to allow the U.S. to exercise jurisdiction where the host nation jurisdiction would not be fair to the defendant, and it will have to be able to fill the jurisdictional vacuum that could lead to jurisdiction from an International Court.

#### A. STATED GOALS OF FOR THE MEJA

##### 1. Unpunished Crime

The concern that there were crimes that were not being tried anywhere, and criminals who were not being punished, was probably the single most compelling justification for the passage of the MEJA.<sup>278</sup> In this regard, the MEJA also clearly accomplishes its objective, by allowing U.S. courts to take jurisdiction over crimes that otherwise would not be tried anywhere.<sup>279</sup> It covers the situations where the host nation does not have a functioning court system,<sup>280</sup> as well as cases where the U.S. has exclusive jurisdiction<sup>281</sup> or where the conduct does not constitute an offense under local law.<sup>282</sup>

The MEJA, however, is really designed to provide jurisdiction over the offenses that the host nation had jurisdiction over, but simply lacked the incentive to prosecute the case.<sup>283</sup> In that situation, if the host country does not request jurisdiction, the U.S. now has the ability to prosecute the case domestically. The MEJA will also likely have an

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<sup>277</sup> See *supra*, Section II(B) and accompanying text (discussing the need for legislation).

<sup>278</sup> See *supra* note 31 and accompanying text, citing the legislative history for the objectives of the MEJA.

<sup>279</sup> 18 U.S.C. § 3261.

<sup>280</sup> See *supra* note 55 and accompanying text.

<sup>281</sup> See *supra* note 56 and accompanying text.

<sup>282</sup> See *supra* note 54 and accompanying text.

<sup>283</sup> See *supra* notes 49-53 and accompanying text.

additional impact in this regard, by creating something of an incentive for the host nation to prosecute certain cases. This is most clearly seen in regard to the death penalty cases.

In *Soering*, the fact that a German national faced a potential death penalty led the German government to take the unusual step of filing a concurrent extradition request for Soering.<sup>284</sup> This was despite the fact that Germany had no connection to the crime itself, which was committed in Virginia, and in fact Germany did not have enough evidence to put together a *prima facie* case against Soering.<sup>285</sup> Nonetheless, Germany continued to push for jurisdiction over the case and took part in the case before the European Court of Human Rights. This extraordinary motivation for Germany to prosecute the case came about simply because the U.S. did have jurisdiction, and there was the threat of the death penalty.

A similar situation occurred in the *Short* case.<sup>286</sup> When the Dutch officials realized that there was the possibility that Short would face the death penalty in a military court, they immediately took him to trial in a Dutch criminal court.<sup>287</sup> They took this step despite the fact that it was in contravention of the NATO SOFA, which gave the sending state primary jurisdiction over their troops.<sup>288</sup> Eventually, the Dutch appellate courts found that this prosecution was invalid,<sup>289</sup> but it once again indicates motivation that a host state has to exercise its jurisdiction to avoid a human rights issue.

The military has noted this in other cases where the U.S. has requested a waiver or host state jurisdiction to court-martial a service member for a capital offense.

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<sup>284</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), 28 I.L.M. 1066 (1989).

<sup>285</sup> *Id.*

<sup>286</sup> *Short v. Kingdom of the Netherlands*, Nos. 13.949, 13.950, excerpted and translated in 29 I.L.M. 1388 (1990).

<sup>287</sup> See *supra* note 227 and accompanying text.

<sup>288</sup> See *supra* note 225 and accompanying text.

<sup>289</sup> See *supra* note 228 and accompanying text.

Receiving state justice officials who once may have used the waiver mechanism as a means of avoiding prosecutorial responsibilities...are increasingly finding waivers in potential capital cases politically unacceptable. With growing frequency, European host receiving states are claiming potential capital cases to be of 'particular importance' or that they affect 'major interests' in their administration of justice.<sup>290</sup>

This trend in denial of requests for waivers under SOFAs is likely to find a direct parallel with the MEJA in death penalty cases. Countries that have international obligations under human rights treaties, extradition treaties, or that are simply opposed to the death penalty, can avoid any extradition issues by simply requesting jurisdiction under the MEJA.<sup>291</sup>

There are also situations where the denial of extradition can lead to an obligation on the part of the host nation to prosecute the case. That was the situation in *Venezia*, where the Italian Constitutional Court noted that Article 9(3) of the Italian Code of Criminal Procedure requires Italian authorities to prosecute a case when extradition is denied.<sup>292</sup> This is a provision that would never have come into play prior to the advent of the MEJA, because there was no way for the U.S. to request the extradition of an overseas DoD civilian for an offense that we had no jurisdiction to prosecute.

Admittedly, these cases only deal with the host nation's interest in taking jurisdiction in offenses where there is the potential for capital punishment. However, these are the types of offenses that have the most impact on the good order and discipline of overseas military installations if they are allowed to go unpunished. While the MEJA

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<sup>290</sup> John E. Parkerson & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 Mil. L. Rev. 41, 51 (1990).

<sup>291</sup> 18 U.S.C. § 3263(a)(1).

<sup>292</sup> See *supra* note 250 and accompanying text. In the same way that the German prosecutors in *Soering* did not have enough evidence to go forward, the Italian prosecutors did not have direct

does not ensure that such an offender will be brought before a U.S. tribunal to possibly face the death penalty, it does accomplish the goal that *somebody* will take jurisdiction and that the crime will be brought to trial. This will avoid the *Gatlin* situation where the offender escapes punishment entirely.<sup>293</sup>

## 2. Foreign Criminal Justice Systems.

The MEJA does not eliminate the possibility that a DoD civilian will have to stand trial in a foreign jurisdiction. The host nation is always going to have jurisdiction over individuals who commit offenses in its territory by virtue of national sovereignty.<sup>294</sup> The MEJA does not attempt to limit that sovereignty, and in fact gives the host nation the primary jurisdiction over offenses by DoD civilians who commit crimes within the territory of the host nation.<sup>295</sup>

However, the MEJA does give the U.S. considerably more bargaining power in regard to jurisdiction. Historically, if a DoD civilian committed a crime in a jurisdiction with extremely harsh punishments or poor procedural safeguards, the U.S. faced a dilemma. It could allow an U.S. national to be tried in a less-than-desirable forum, or request that the host nation waive jurisdiction to the U.S.. However, because the U.S. could not try the individual for the crime, the request was essentially that the host nation

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access to the evidence in *Venezia*. The Italian's overcame that hurdle by taking the extraordinary step of holding evidentiary hearings in Miami, FL. See *supra* note 250 and accompanying text.

<sup>293</sup> See *supra* notes 85-95 and accompanying text analyzing the *Gatlin* decision.

<sup>294</sup> See *supra* notes 46-47 discussing the NATO SOFA's language regarding jurisdiction.

<sup>295</sup> 18 U.S.C. § 3263(a)(1). The host country must, however, make an affirmative request for jurisdiction over the individual for them to be delivered to the host nation, rather than the U.S. having to request permission to exercise jurisdiction. One open question will be exactly how the MEJA will interplay with the SOFAs. Many SOFAs require the U.S. to request that the host nation waive jurisdiction before the U.S. can try a person subject to the SOFA. See *supra* notes 46-53, discussing the waiver provisions of the NATO SOFA. It is unclear who will have to make the first request in such a situation; whether the U.S. will have to make the first request for a waiver under the SOFA, or whether the host nations will have to initiate by requesting delivery under the MEJA.

permit the offense to go unpunished.<sup>296</sup> Obviously, this was not a particularly strong bargaining position.

The MEJA gives the host nation a much better alternative than simply turning the suspect over to the U.S. when it knows the U.S. lacks the ability to punish the offender. The U.S. no longer has to counter local jurisdiction with no punishment, but can now use domestic jurisdiction as an incentive for the host nation to waive its interest in trying the case. This gives the U.S. considerably more leverage in attempting to get one of its nationals out of a less-than-desirable forum, because the host nation knows that the crime will not go unpunished.

### 3. International Tribunals

As previously noted, legal scholars have expressed concern that international tribunals such as the ICC would step in to fill the jurisdictional void if the U.S. could not exert jurisdiction over its DoD civilians overseas.<sup>297</sup> In this regard the MEJA clearly accomplishes the goal of filling the jurisdictional void.

The ICC, if and when it goes into effect, will be empowered to try cases involving genocide, crimes against humanity, war crimes and the crime of aggression.<sup>298</sup> However, the ICC is limited in that it can only hear cases where the host nation is unable to prosecute the crime.<sup>299</sup> The MEJA extends domestic federal law to DoD civilians in their overseas locations,<sup>300</sup> and thus limits the ICC's potential jurisdiction for crimes covered by the MEJA. As discussed earlier, DoD civilians are most likely to run afoul of the ICC

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<sup>296</sup> See Gibson, *supra* note 37, discussing the negotiations surrounding one case in Saudi Arabia.

<sup>297</sup> See *supra*, note 83 and accompanying text. See also, note 77 *supra*, regarding the current status of the creation of the ICC.

<sup>298</sup> ROME STATUTE, *supra* note 76, article 5(1).

<sup>299</sup> See *supra* note 81 and accompanying text.

<sup>300</sup> 18 U.S.C. § 3261(a).

by engaging in conduct such as a rape or a murder.<sup>301</sup> These types of crimes are clearly covered under domestic law, and thus are brought under domestic jurisdiction by the MEJA.<sup>302</sup> Thus, the MEJA has given the U.S. the jurisdiction to prosecute the crimes that would most likely lead to a prosecution of a DoD civilian in the ICC.<sup>303</sup>

In this way, the MEJA allows the U.S. to defend against the jurisdiction of the ICC over DoD civilians, by making the most likely offenses subject to the ICC domestic crimes as well.<sup>304</sup> Thus, the MEJA will be successful in limiting the jurisdiction of international tribunals by filling the jurisdictional void for crimes committed by DoD civilians overseas.

#### B. METHODS TO MAKE THE MEJA MORE EFFICIENT

The passage of the MEJA will go a long way toward closing the jurisdictional gap and re-asserting judicial accountability for overseas DoD civilians, however, there are a number of ways that its efficacy can be even greater. With minor revisions to the act itself, and careful drafting of the implementing regulations, the scope of offenses that are practical to prosecute under the MEJA can be increased.

##### 1. Eliminate the Death Penalty for MEJA Offenses

One revision to the MEJA itself that would simplify the process of gaining extradition in these offenses would be to eliminate the death penalty as a potential

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<sup>301</sup> See *supra*, note 83 and accompanying text. Crimes of aggression are not criminalized under U.S. law, but it is unlikely that a DoD civilian without command authority would be tried for such crimes.

<sup>302</sup> See *supra* note 83, arguing that rape and murder are the most like charges to arise against a DoD civilian under the ICC. 18 U.S.C. § 1111 sets out the federal crime of murder, and 18 U.S.C. § 2241 sets out the federal crime of rape.

<sup>303</sup> This assumes that if the death penalty is a possible punishment for the offense that the U.S. gives assurances that the host nation finds adequate for extradition.

<sup>304</sup> In addition to the most likely charges under the ICC, the U.S. Code establishes criminal offenses for torture and genocide as well. See 18 U.S.C. § 2340A setting out the federal crime of torture, and 18 U.S.C. § 1091, setting out the federal crime of genocide.

punishment for offenses under the MEJA. It would not require elimination of the death penalty for all domestic offenses, but only for MEJA offenses. It could be accomplished by amending section 3261(a) of the MEJA to read; "shall be punished as provided for that offense, except that a sentence of death is not an available punishment for any crime under this chapter."<sup>305</sup>

This is precisely what the Italian Constitutional Court recommended in the *Venezia* case.<sup>306</sup> Such an amendment would eliminate most of the diplomatic wrangling over extradition in such cases, such as whether the U.S.' assurances regarding the death penalty are sufficient.<sup>307</sup> It may also be the only way that the U.S. will ever get jurisdiction over such a crime committed in Italy after the *Venezia* decision.<sup>308</sup>

This suggestion is pragmatic rather than ideological. The U.S. would give up little in making such an amendment. A majority of the people covered by the MEJA is stationed in abolitionist countries.<sup>309</sup> After the *Soering* decision, an absolute assurance that the death penalty will not be imposed has generally been required to secure

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<sup>305</sup> 18 U.S.C. § 3261(a) (proposed amendment underlined).

<sup>306</sup> See *supra*, note 248 and accompanying text.

<sup>307</sup> See *supra*, note 141 and accompanying text, discussing the language in the Model Extradition Treaty requiring satisfactory assurances that the death penalty will not be imposed or executed.

<sup>308</sup> See *supra*, note 248 and accompanying text, stating that three possible methods to secure extradition of capital offenders from Italy are enacting legislation, an executive agreement, or a judicial order in a specific case. In theory the U.S. could enter into an executive agreement with Italy that the death penalty will not be an option for cases under the MEJA (or any other case where the U.S. is seeking extradition of a defendant from Italy). However, that would have no effect on extradition from other abolitionist states. It would also be extremely cumbersome to have to get a judicial order negating the death penalty for a specific defendant prior to seeking extradition. But see *supra* note 251 and accompanying text arguing that *Venezia* prohibition on extradition may be limited to cases involving Italian citizens by Article 26 of the Italian Constitution.

<sup>309</sup> See *supra*, notes 163, 172 and accompanying text, discussing the number of individuals subject to the MEJA who are stationed in nations that are signatories to the various human rights treaties that abolish the death penalty.

extradition from these countries.<sup>310</sup> As demonstrated in the discussion of *Venezia*, there are nearly 18,000 DoD civilians stationed in Italy, and such an amendment may be the only feasible way to gain extradition over these individuals where capital punishment is authorized.<sup>311</sup>

The only jurisdiction the U.S. would be forfeiting would be cases from other death penalty states, where the person would actually receive the death penalty in the U.S.. These cases are extremely few and far between. Prior to the execution of Timothy McVeigh, the federal government had not actually carried out a death sentence since 1963.<sup>312</sup> The limited number of DoD civilians stationed in death penalty states,<sup>313</sup> combined with the fairly low incidence of extremely violent crime among that population and the reluctance of American courts to impose the death penalty, minimizes the loss of jurisdiction. Our inability to execute these few individuals would be more than offset by our ability to gain jurisdiction over offenses committed in abolitionist nations. This amendment would extend the reach of the MEJA to exactly the types of offenses that the act was geared toward, and make it a much more effective tool.

## 2. Assign a Specific Venue for Prosecutions Under the MEJA

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<sup>310</sup> See *supra* notes 218 and accompanying text

<sup>311</sup> See *supra* notes 253 and accompanying text regarding the *Venezia* decision.

<sup>312</sup> See Paul Dugan, *As McVeigh's Execution Looms, Death Penalty Foes in Tough Spot*, THE WASHINGTON POST, May 2, 2001 at A3.

<sup>313</sup> Approximately 2/3 of overseas DoD civilians are stationed in host states that have signed one or more of the human rights treaties that abolish the death penalty. DIOR Report, *supra* note 36. Many extradition treaties limit extradition to whether the host nation can impose the death penalty for the particular offense involved. See *supra* note 141 and accompanying text, laying out the provisions of the U.S.-U.K extradition treaty. Thus, it would be nearly impossible to analyze all of the potential situations where the offense would carry the death penalty in the U.S., but not in the host state for any given crime. However, it can safely be assumed that this situation could occur even in retentionist host states, and that assurances would have to be given for those defendants as well.



Another method to assist the MEJA in closing the jurisdictional gap is to assign specific venues for the prosecution of MEJA offenses. The MEJA does not address the precise location where such prosecutions are to take place.<sup>314</sup> One possible solution to streamline and add a degree of certainty to this process would be to designate a specific district for all MEJA prosecutions.<sup>315</sup> This would ensure that the military authorities would know whom to notify when such cases arise. It would also create an experienced cadre of prosecutors and judges who would be familiar with proceedings under the MEJA, increasing the likelihood of a smooth and timely prosecution. At the same time, having an experienced U.S. attorney to prosecute the cases would likely increase the willingness of the U.S. attorney to undertake such prosecutions, extending the types and numbers of crimes that would actually be prosecuted under the MEJA.

The Federal Rules of Civil Procedure do not deal with the venue for crimes committed extraterritorially. Rule 18 states that the venue for the prosecution is the district where the offense is committed.<sup>316</sup> This is obviously inapplicable to prosecutions under the MEJA. 18 U.S.C. § 3238 deals with offenses that are not committed in the U.S..

#### Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the

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<sup>314</sup> See Schmitt, *supra* note 102 at 9.

<sup>315</sup> *Id.* at 10.

<sup>316</sup> Fed. R. Crim. P. 18.

District of Columbia.<sup>317</sup>

However, this provision does not appear to cover the initial proceedings under the MEJA.<sup>318</sup> Thus, it is unclear where such proceedings would take place.

Additionally, prosecutions under the MEJA will require some special attention and expertise from the prosecuting attorneys and judges. They will have to deal with the potential for telephonic hearings under the MEJA, as well as interfacing with military authorities and foreign law enforcement officers. While a fair number of cases can be anticipated under the MEJA, if the cases are distributed over every federal trial court there is the potential that the proverbial wheel will have to be re-created with each prosecution.

### 3. Create Special Assistant U.S. Attorney Positions Overseas.

In any prosecution, whether under the MEJA or otherwise, there is a need for a person to be responsible for the pre-trial preparation of the case. One of the specific difficulties that prosecutors will face with the MEJA is that no one is charged with packaging the investigation for prosecution. The U.S. attorney who is assigned to prosecute such a case will often simply be informed that a DoD civilian has been delivered to the custody of U.S. law enforcement by the military. If there is a report of any kind on the case, it is likely to have been produced by foreign law enforcement officers, or possibly by the military officials.<sup>319</sup> It will then be up to the U.S. attorney to conduct telephone interviews with the witnesses, probably across many time zones, and to try to coordinate the facilities for the initial hearing.

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<sup>317</sup> 18 U.S.C. § 3238.

<sup>318</sup> See Schmitt, *supra* note 102 at 9.

<sup>319</sup> This is especially likely if the case arises in a country that does not have an operational law enforcement system. See *supra* note 55 and accompanying text.

This process would be greatly simplified and enhanced by appointing a judge advocate at each overseas facility as a special assistant U.S. attorney.<sup>320</sup> Judge advocates are routinely appointed as special assistant U.S. attorneys to prosecute cases arising on domestic military installations that are under exclusive federal jurisdiction.<sup>321</sup> Having a special assistant U.S. attorney physically present in the host nation will have numerous advantages.

As a special assistant U.S. attorney, the judge advocate would be able to interface with the foreign law enforcement officials. The judge advocate would likely be familiar with the local law enforcement officials through military justice actions where military members have been involved in off-base misconduct. This relationship will prove invaluable in situations where additional investigation is required or the foreign officials are called to testify. Having a prosecutor on site will also facilitate witness interviews where there can be a large disparity in time zones. The stateside prosecutor will not

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<sup>320</sup> 28 U.S.C. § 543 sets out the authority for appointment as a special assistant U.S. attorney.  
Special attorneys

(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

28 U.S.C. § 515 sets out the duties of a special assistant U.S. attorney:  
Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

<sup>321</sup> See *United States v Allred* 867 F2d 856, 870 (5<sup>th</sup> Cir. 1989), holding that the appointment of a judge advocate as a special assistant U.S. attorney does not violate Posse Comitatus. See also 10 U.S.C. § 806(d)(1) setting out the authority of a judge advocate who has been appointed as a special assistant U.S. attorney.

necessarily have to be conducting interviews in the middle of the night to accommodate witness' schedules.

Perhaps the most important function that a judge advocate would perform as a special assistant U.S. attorney is in putting the case together and presenting it to the Judge at the initial proceeding. As a special assistant U.S. attorney, the judge advocate would be able to analyze the case and fill the gaps prior to the stateside attorney's active involvement. Additionally, having an attorney on site for the initial hearing, where they could call and question witnesses in person would be invaluable.

Allowing a judge advocate to perform this service for the U.S. attorney would enhance the scope of offenses that would be pursued under the MEJA. The judge advocate clearly has a strong motivation to bring the case to trial because it is being prosecuted on behalf of the military commander.<sup>322</sup> Involving an on-site prosecutor with a strong motive to make the MEJA work can only make it a stronger tool for the military commander.

#### 4. Clarify the Military Law Enforcement Role under Posse Comitatus.

Another issue that is likely to arise in MEJA prosecutions, with the potential to limit its effectiveness in closing the jurisdictional gap, is the role of the military law enforcement officials in investigating the offense. The Posse Comitatus Act states that "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or

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<sup>322</sup> See *supra* note 43, citing language from the legislative history describing the military's interest in prosecuting crimes committed by DoD civilians overseas.

imprisoned not more than two years, or both.”<sup>323</sup> This is a blanket prohibition that does not limit its application to domestic situations on its face. However, there has not been a case raising Posse Comitatus in an extraterritorial situation, so the question remains open whether it would apply extraterritorially.

Posse Comitatus is likely to arise because the MEJA only expressly permits military law enforcement officers to arrest DoD civilians overseas and to deliver them to the host nation for prosecution.<sup>324</sup> These sections are an express “Act of Congress” and thus will be exceptions to the rule. The issues that will arise, however, are: 1) how involved can the military law enforcement officer be in investigating the crime prior to making an arrest?; and 2) what will the involvement of military law enforcement officers be after the arrest? In these situations, it is likely that Posse Comitatus will be raised in a motion to suppress any evidence taken by the military investigators.<sup>325</sup>

Generally, military law enforcement officers have the ability to enforce the laws on military installations.<sup>326</sup> Thus, the critical situations will arise when the crime is committed off-base, and there either are no local law enforcement officials available,<sup>327</sup>

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<sup>323</sup> 18 U.S.C. § 1385.

<sup>324</sup> Subsection (a) of 18 U.S.C. § 3262 gives arrest powers to military law enforcement officials when there is probable cause that a suspect has committed a MEJA offense. However, the MEJA is silent in regard to investigation of potential crimes and the military’s role in such an investigation.

<sup>325</sup> Violations of 18 U.S.C. § 1385 do not automatically mean that evidence obtained as result of violations will be suppressed. See *State v. Trueblood*, 46 N.C. App. 541, 265 SE2d 662 (1980). However, cases dealing with such suppression motions have typically arisen where the military was supporting civilian law enforcement in some way. A motion to suppress will likely be stronger in a situation where the military was the sole law enforcement agency as they likely will be for cases under the MEJA where the foreign authorities decline to assist in the investigation.

<sup>326</sup> See *United States v. Banks*, 539 F2d 14 (9<sup>th</sup> Cir 1976), *cert. den.* (1976) 429 U.S. 1024 (1977).

<sup>327</sup> See *supra* note 55 and accompanying text, discussing the need for the MEJA in situations where DoD civilians are stationed in areas where there is not a functioning local government.

or the local officials decline to investigate the case.<sup>328</sup> In either situation the Posse Comitatus Act could act as a bar to a military investigation, and thus any investigation at all, of the crime.

This situation would be rectified if the MEJA were amended to specifically authorize military law enforcement officials to investigate crimes under the MEJA. An additional subsection to section 3262 could be added to read, "The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to investigate, in accordance with applicable international agreements, outside the United States any person described in section 3261(a)."<sup>329</sup> The addition of this section would clarify the standing of military law enforcement officials to investigate offenses under the MEJA without the constraints of the Posse Comitatus Act.

Such an amendment would be consistent with the purpose of the Posse Comitatus Act. The act was designed to meet the danger inherent in having the Armed Forces enforcing the laws, because military members in general are trained to operate under circumstances where protection of constitutional freedoms are not a primary consideration.<sup>330</sup> Military members are generally trained to fight and win wars, rather than protecting individual rights. Another concern the Posse Comitatus Act was designed

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<sup>328</sup> See *supra* notes 49-53 and accompanying text, discussing the need for the MEJA in situations where local law enforcement declines to prosecute cases.

<sup>329</sup> The military law enforcement officials would still need the consent of the host nation to conduct an investigation on foreign soil, although failure to secure such consent would most likely not be fatal to a prosecution under the MEJA.

<sup>330</sup> See *United States v McArthur* 419 F. Supp 186 (1975, DC ND), *aff'd*, 541 F.2d 1275 (8<sup>th</sup> Cir 1976), *cert. den.* 430 U.S. 970 (1977).

to address was the effect that imposition of martial law has on a civilian populace, and the impact that martial law can have on constitutional freedoms.<sup>331</sup>

However, neither of these concerns is applicable to the MEJA. There is little danger that DoD law enforcement officials are likely to impose martial law on foreign soil.<sup>332</sup> Additionally, the MEJA limits the military involvement in its enforcement to DoD law enforcement officials. These are not average combat troops, but are law enforcement specialists who are trained and experienced in investigatory techniques that protect the constitutional rights of a suspect. In fact, they are likely more familiar with, and able to protect, DoD civilian's constitutional rights than many foreign law enforcement officials are. Thus, allowing them to investigate crimes under the MEJA would promote, rather than violate, the purposes of the Posse Comitatus Act.

Clarifying the military law enforcement official's role in investigating crimes under the MEJA would also expand the scope of prosecutions under the MEJA. The military investigators, like the judge advocates, have a strong motivation to assist the commander in maintaining good order and discipline in the overseas environment. They are uniquely qualified to investigate such crimes, while protecting the constitutional rights of the suspects. Without direct authorization for their involvement in the investigation, many offenses will not be investigated at all, and the offenders will remain unpunished.

#### C. ADDITIONAL POTENTIAL PROBLEM AREAS OF THE MEJA

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<sup>331</sup> See *United States v. Red Feather*, 392 F. Supp 916 (1975, DC SD), discussing the detrimental effect that the use of military troops during reconstruction had on the South.

<sup>332</sup> There may be situations where they are called on to do so as part of a peacekeeping operation, but that is clearly not the situation that the Posse Comitatus Act was concerned about.

In addition to the issues that need to be addressed to allow the MEJA to operate as efficiently as possible in closing the jurisdictional gap, there are additional issues that should be addressed as well. These issues may not have a direct bearing on the ability of the MEJA to bring offenders to trial, but they are areas that should be addressed to clarify the MEJA's operation and to make the act as equitable as possible.

1. Clarify the ability of the commander to perform a pre-trial detention hearing.

One concern that could affect the fairness of the overall operation of the MEJA, if not expand its coverage, is the ability of the military commander to release a suspect from pre-trial confinement. The military officials are required to deliver the arrestee to civilian law enforcement officials as soon as practicable.<sup>333</sup> It is presumed that the arrestee will be held in a military detention facility prior to delivery to the civilian authorities. The legislative history makes a further reference to this detention, stating "The committee notes that in some cases, military authorities may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265."<sup>334</sup> This is curious because there is no provision in the MEJA for military authorities to conduct any sort of pre-trial confinement hearing. It is unclear what authority, and under what circumstances, the military authorities would release such an arrestee prior to a hearing.

The authority of the commander to determine whether pre-trial confinement is appropriate is another aspect of the MEJA that will need to be clarified for it to operate smoothly.<sup>335</sup> It would be unjust to hold a suspect of a minor crime in military

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<sup>333</sup> 18 U.S.C. § 3262(b).

<sup>334</sup> H.R. Rep. No. 106-778, at 17.

<sup>335</sup> See *supra* note 334 and accompanying text, discussing the legislative history's reference to the ability of the commander to release a suspect after arrest.



confinement, with no possibility of bail, from the time of arrest until such time as an initial proceeding can be held.<sup>336</sup> This is especially true because one of the purposes of the initial hearing is to determine the conditions of release.<sup>337</sup> However, while the legislative history hints that a commander might have this power, there is nothing in the MEJA that would authorize the military authorities to release a suspect prior to the civilian judge holding such a hearing and ordering the release.

The military system is well equipped to handle such a decision because it does so on a daily basis in regard to service members. There would have to be a parallel set of rules for civilians, but modeling the civilian rules on the military rules would have the advantage of familiar proceedings for the military authorities when making such determinations.

Rule for Courts-Martial (R.C.M.) 305 deals with pre-trial confinement hearings for military members, and a similar rule could be created to deal with civilians arrested under the MEJA. Ordinarily, a military suspect is not subject to pre-trial restraint (other than that inherent in being a military member). However, a military commander can order that a suspect be placed into pre-trial confinement if it is needed.<sup>338</sup> This decision must be reviewed within 72 hours to determine whether it truly is required.<sup>339</sup> A full hearing to determine the necessity of the pre-trial confinement, presided over by a neutral

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<sup>336</sup> See *infra* Section V(C)(2) for a discussion of the possible timing of the section 3265 hearing.

<sup>337</sup> 18 U.S.C. § 3265(a)(3).

<sup>338</sup> R.C.M. 305 (d) requires the commander to first find that there is a "reasonable belief" that the suspect committed the crime, and that pre-trial confinement is required by the circumstances.

<sup>339</sup> R.C.M. 305 (h)(2)(A). The rule goes on to define pre-trial confinement as "necessary" where other forms of restraint would be insufficient because there is a danger of flight, or the individual is considered dangerous. R.C.M. 305 (h)(2)(B). This is similar to the standard a federal judge would use determine conditions on release under 18 U.S.C. §3142(f). See *supra* notes 114-123, discussing the initial hearing.

and detached officer, is required within 7 days.<sup>340</sup> The accused is provided counsel for this hearing.<sup>341</sup> Only if that officer agrees that the pre-trial confinement is necessary will it be continued. Ultimately, the decision for pre-trial confinement can be judicially reviewed.<sup>342</sup>

Creating a similar framework, where a neutral officer makes a timely determination of the propriety of pre-trial confinement, would be appropriate for the MEJA as well. If such a hearing is held, it also highlights the need for a special assistant U.S. attorney to be appointed at the base, so that the prosecution's position can be presented to the reviewing officer as well.<sup>343</sup> While this provision would not necessarily extend the jurisdiction of the MEJA or add to the cases likely to be brought under it, justice and fairness dictate that a suspect should not necessarily be held in confinement until the § 3265 hearing can be held.

The Secretary of Defense is required to prescribe regulations governing the apprehension, detention, delivery, and removal of suspects under the MEJA.<sup>344</sup> The Secretary is also to prescribe regulations to facilitate the initial hearings.<sup>345</sup> Allowing the local military commander to release the suspect prior to the initial hearing would make the MEJA prosecutions more equitable and palatable, and therefore more efficient.

## 2. Set firm timelines for the various provisions under the MEJA.

Another similar consideration that should be addressed either by an amendment to the MEJA or in the implementing regulations is to set time limits for the various steps of

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<sup>340</sup> R.C.M. 305 (i).

<sup>341</sup> R.C.M. 305 (f).

<sup>342</sup> R.C.M. 305 (j).

<sup>343</sup> See *supra* Section V(B)(3) for the argument that a local judge advocate should be appointed as a special assistant U.S. attorney to assist in prosecutions under the MEJA.

<sup>344</sup> 18 U.S.C. § 3266(a).

the prosecution. Prosecutions under the MEJA are likely to be quite complicated, especially when dealing with the host country, and will have a tendency to be drawn out as unforeseen difficulties arise. Appointing a special assistant U.S. attorney on site, and having a single district prosecute the cases will streamline the process immensely, however, there should be time limits for each of the steps leading to the prosecution.

The most likely sticking point in the system is that the primary jurisdiction is given to the host country. The MEJA prohibits the U.S. from proceeding with a prosecution if the host country is exercising their primary jurisdiction, and the suspect is to be delivered to the host nation for prosecution if they request it.<sup>346</sup> The question then becomes how long to wait with an initial hearing if the host nation has indicated that they may wish to prosecute the case but has not made a firm decision.

It is certainly possible that a host nation could take an indeterminate amount of time to decide whether they wish to take jurisdiction over the case or not. This will be especially troubling if the military commander lacks the ability to release a suspect from confinement.<sup>347</sup>

Setting a firm time limit for the host nation's decision will add certainty and fairness to prosecutions under the MEJA. These time limits would not be binding on the host nation in that their jurisdiction would not terminate if they did not make a decision within the time limit. However, it would help to avoid a situation where a suspect would languish in pre-trial confinement waiting for the host nation to make a decision.

### 3. Jurisdiction over former service members.

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<sup>345</sup> *Id.*

<sup>346</sup> 18 U.S.C. §§ 3261(b), 3263.

<sup>347</sup> *See supra* Section V(C)(1).

One jurisdictional anomaly of the MEJA should also be addressed for purely equitable reasons. The jurisdiction of the MEJA extends to a second group of individuals: those who commit the conduct “while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice)”.<sup>348</sup> This language is intended to reach a discharged serviceman for crimes committed while on active duty.<sup>349</sup> It does so by limiting the MEJA's jurisdiction to discharged service members.<sup>350</sup> This additional language creates a situation where former service members who committed crimes overseas are treated differently than those who committed the same offenses in the U.S..

Court-martial jurisdiction over a service member effectively ends at the time of discharge.<sup>351</sup> However, the UCMJ is a federal act, and would be encompassed by the jurisdictional language of the MEJA. This does not create any difficulty regarding crimes that have a federal civilian counterpart, as the federal courts would have jurisdiction over them regardless of where they were committed. However, consider the situation of a service member who commits a uniquely military offense overseas, and then separates.<sup>352</sup> The MEJA would extend federal jurisdiction over that member simply because the conduct was committed outside of the U.S., even though court-martial jurisdiction has ended. Thus, a member who committed the act stateside would be immune from

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<sup>348</sup> 18 U.S.C. § 3261(a)(2).

<sup>349</sup> See 146 Cong. Rec. H6930-32 (daily ed. July 25, 2000) (prepared statement of Rep. Bill McCollum) stating, “This portion of the bill is designed to authorize the government to punish persons who are discharged from the military before their guilt is discovered and who, because of that discharge, are no longer subject to court-martial jurisdiction.”

<sup>350</sup> 18 U.S.C. § 3261(d).

<sup>351</sup> See *United States v. Wilson*, 53 M.J. 327 (2000).

<sup>352</sup> Such uniquely military offenses would include Article 133 “Conduct Unbecoming an Officer”, 10 U.S.C. § 933; “Failure to Obey Order or Regulation”, 10 U.S.C. § 892; or “Absence Without Leave”, 10 U.S.C. § 866.

prosecution at the time of discharge, whereas the service member who committed the exact same act would still be under federal jurisdiction by virtue of the MEJA.<sup>353</sup> This is not likely to be a major problem, but it is an issue that should be addressed.

#### 4. Appointment of Military Defense Counsel

Another issue that will need to be clarified is the method of appointing a military defense counsel for a MEJA defendant. The MEJA provides for military counsel to be appointed for overseas defendants who are otherwise entitled to appointed counsel.<sup>354</sup> Ordinarily, the defendant will be responsible for retaining a civilian counsel at his own expense. However, if the defendant is entitled to appointed counsel, the magistrate has the ability to appoint a military defense counsel for the defendant.<sup>355</sup> Such counsel must be a graduate of an accredited law school or a member of a federal or state court bar.<sup>356</sup> The counsel must also be certified competent as a defense counsel by The Judge Advocate General of the counsel's branch of service.<sup>357</sup>

The MEJA indicates that the counsel must be made available by the Secretary of Defense for the purposes of such proceedings.<sup>358</sup> It is unclear exactly how that term is to be interpreted. The legislative history only states that "The judge may appoint only those members of the military designated for that purpose by the Secretary of Defense."<sup>359</sup>

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<sup>353</sup> It is difficult to imagine a U.S. attorney prosecuting a case of AWOL against a prior service member, however, there may be situations where the U.S. attorney would be interest in prosecuting more serious offenses.

<sup>354</sup> 18 U.S.C. § 3265(c)(1).

<sup>355</sup> 18 U.S.C. § 3265(c)(1).

<sup>356</sup> 18 U.S.C. § 3265(c)(2)(A).

<sup>357</sup> 18 U.S.C. § 3265(c)(2)(B).

<sup>358</sup> 18 U.S.C. § 3265(c)(2).

<sup>359</sup> H.R. Rep. No. 106-778, at 19.

Thus, it might mean individuals who have been so designated by name, or individuals who occupy certain positions that have been so designated.<sup>360</sup>

It is also unclear whether a defendant will be able to request a given judge advocate by name. The reason for this possible confusion is that the term "made available" is very similar to the term "reasonably available" which is used in the rule for a military member's right to select his appointed counsel.<sup>361</sup> It is not clear whether a civilian defendant in a MEJA action will have the same right to select the military counsel of his choice that a military member enjoys for a court-martial. As an initial matter, this will likely depend on whether the magistrate conducting the hearing is willing to appoint a particular judge advocate when the defendant makes a by-name request for a specific counsel.<sup>362</sup>

## VI. THE NEED FOR COURT-MARTIAL JURISDICTION

The single biggest impediment to the MEJA's ability to accomplish its goals, however, remains unaddressed because it is in the very structure of the MEJA itself. The cost and complexity of getting witnesses and evidence from overseas for a MEJA prosecution mean that its implementation will necessarily be limited to the most serious offenses. An 18-year-old dependent dealing drugs out of base housing can have a

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<sup>360</sup> Many military installations have one or more judge advocates who are designated as the full-time defense counsel for that installation. It is possible that the MEJA anticipates that the Secretary of Defense will designate the position the installation defense counsel as the available judge advocate for such proceedings rather than designating individual judge advocates by name.

<sup>361</sup> Rule for Courts-Martial (R.C.M.) 506 grants an accused the right to a civilian counsel at no expense to the government, a detailed military counsel (not chosen by the accused) or "military counsel of the accused's own selection, if reasonably available." The determination of whether the requested counsel is "reasonably available" is made by the counsel's supervisor based on the counsel's duties.

<sup>362</sup> 18 U.S.C. § 3265(c)(1) merely states that "the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel." It is also unclear whether the military defense counsel's supervisor will have any say in regard to whether the counsel is in fact available, similar to their R.C.M. 506 authority.

significant impact on the local military community as well as the host nation. However, the odds of a U.S. Attorney going through the expense and the administrative difficulties of bringing a MEJA prosecution for a relatively small drug offense are very low. The MEJA is well designed and suited to the prosecution of serious offenses, as long as they do not rise to the level of the death penalty, but its inefficiencies will preclude its usefulness for smaller offenses.

One possible solution to this problem, that would fully close the jurisdictional gap, would be to re-establish limited court-martial jurisdiction to overseas DoD civilians. The UCMJ would not require significant structural changes to meet the concerns of the Supreme Court in *Reid* and its progeny. Limiting the sentencing powers of the court-martial would obviate the constitutional deficiencies of a court-martial addressed by the *Reid* court. Limited court-martial jurisdiction would give the U.S. the ability to assert its jurisdiction over minor offenses that have the potential to cause major problems, and would fully address the jurisdictional gap.

The *Reid* court had two fundamental issues with court-martial jurisdiction over civilians. The first consideration was the fact that the court-martial system does not make allowance for, or have the ability to incorporate, the grand jury system of pre-trial investigation.<sup>363</sup> The second issue was the lack of traditional juries in the court-martial system.<sup>364</sup> Neither of these issues would be an impediment to the re-introduction of court-martial jurisdiction over DoD civilians who commit offenses overseas if the sentencing authority were of the court-martial were limited to sentences that are petty offenses in the civilian courts. Petty offenses do not entitle a defendant to a grand jury

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<sup>363</sup> CITE TO REID

<sup>364</sup> CITE TO REID

investigation or trial by jury in the civilian criminal courts, so there would not be a constitutional issue with their absence in a court-martial either.

There are three types of courts-martial. The summary court-martial is, as its name implies, a very limited proceeding. It does not require a judge, as any commissioned officer can preside over it, and is limited to minor offenses.<sup>365</sup> This particular type of court is not well suited to jurisdiction over DoD civilians and would not be used because it does not provide the constitutional protections required by *Reid*.

The other two types of courts-martial, the special court-martial and the general court-martial, have jurisdiction over all offenses under the UCMJ. They both have provision for a military judge as well as members.<sup>366</sup> The general court-martial can sentence the accused up to the maximum punishment authorized for the offenses, up to and including a sentence of death. The special court-martial, however, has historically been limited to sentences of six months of confinement or less, regardless of the maximum punishment authorized for the offenses.<sup>367</sup> It is the special court-martial that could serve as a basis for court-martial jurisdiction for overseas DoD civilians.

The Supreme Court decisions that removed court-martial authority over civilians were all based on general courts-martial with the ability to announce extremely long

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<sup>365</sup> Arts. 16(3), 20 UCMJ, 10 U.S.C. §§ 816(3), 820.

<sup>366</sup> The members of a court-martial have duties that are similar to those of a jury in the civilian system. If an accused chooses to be tried by members, the members serve as the fact-finders in the case and the military judge rules on questions of law. In a members trial, the members also impose the sentence on the accused in a second portion of the trial, after deciding on the accused's guilt.

<sup>367</sup> In 1999 the maximum confinement that a special court-martial can impose was increased to one year. UCMJ art. 19, 10 U.S.C. § 819, as amended Oct. 5, 1999, P.L. 106-65, Div. A, Title V, Subtitle J, § 577(a), 113 Stat. 625. The maximum confinement is still limited to six months if a verbatim transcript is not recorded. *Id.* A verbatim transcript would be required to allow appeals of civilian convictions. Thus, Article 19 would have to be amended again to limit a special court-martial for civilians to six months of confinement.



sentences to confinement.<sup>368</sup> The constitutional shortcomings of the court-martial were highlighted and exacerbated by the fact that they were courts with full sentencing powers. But the constitutional defects that formed the basis of the *Reid* decision would not be impediments to court-martial jurisdiction if it were limited to a special court-martial with only a six month cap on confinement. Because a limited court-martial could not sentence an accused to more than six months of confinement, there would be no requirement for a grand jury indictment, or for a trial by jury.

#### A. GRAND JURY ENTITLEMENTS

There is not a right to a grand jury investigation for all offenses in civilian courts.

Rule 7 of the Federal Rules of Criminal Procedure states:

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or information. An information may be filed without leave of court.<sup>369</sup>

Thus, a defendant in a civilian federal court would not have the right to a grand jury indictment for an offense that had a maximum punishment of six months of confinement or less. There would be no infringement on the rights of a DoD civilian, in regard to a grand jury, by prosecuting them at a limited court-martial without a grand jury because they would not have a right to a grand jury regardless of the forum. Obviously this was not the case with the general courts-martial at issue in *Reid et al.*

#### B. JURY TRIAL RIGHTS

The same is true for trial by jury. Although the Sixth Amendment appears to grant the right to a jury trial for all offenses, it is now well established that the right to a

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<sup>368</sup> The *Reid* court was careful to limit its decision to only capital cases. See *supra* note 20 and accompanying text.

jury trial is limited to serious offenses.<sup>370</sup> The courts have used various criteria to determine what constitutes a “serious offense” in the past, looking to such things as the nature of the offense or whether the common law provided a jury trial for the particular offense.<sup>371</sup> However, the Supreme Court clarified the criteria for determining whether an offense is serious in their decision in *Lewis v. United States*.<sup>372</sup> In *Lewis*, the court held that “Now, to determine whether an offense is petty, we consider the maximum penalty attached to the offense....An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious.”<sup>373</sup>

If Congress authorized limited courts-martial for overseas DoD civilians, it would be making a legislative determination that these are petty offenses that would not entitle an accused to a jury trial.<sup>374</sup> That is because these courts-martial would be limited to sentences of six months or less, the exact dividing line that the Supreme Court has established for the right to jury trials, regardless of the nature or number of offenses charged.<sup>375</sup> Procedures would have to be established to give the U.S. Attorney the first

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<sup>369</sup> Fed. R. Crim. P. 7.

<sup>370</sup> *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

<sup>371</sup> *Blanton v. North Law Vegas*, 489 U.S. 538, 541 (1989).

<sup>372</sup> 518 U.S. 322 (1996).

<sup>373</sup> *Id.* at 326.

<sup>374</sup> A special court-martial entitles the accused to a members trial. The members are military officers, and if the accused is enlisted they can request enlisted members as well. It would be consistent with *Lewis* for Congress to eliminate the right to members for civilian special courts-martial. If the right to a trial by members were extended to civilians, it would likely be Constitutionally sound as well. A civilian accused would still have the option of being tried judge alone, which is all he would be entitled to in a civilian court. If the accused chose to be tried by members, it would be an added benefit and it would be difficult for him to allege on appeal that he was somehow prejudiced by his choice to accept this benefit.

<sup>375</sup> There is a possible question as to whether offenses that would have a much higher sentence if tried in as general court-martial (or a civilian federal court) can be transformed into a petty offense simply by limiting the sentencing ability of the court. However, a Congressional determination that violations of the UCMJ by overseas DoD civilians are petty offenses by

opportunity to prosecute the case under the MEJA with all of the constitutional rights that are attendant to a federal prosecution. A court-martial would only take jurisdiction if the U.S. attorney declined to prosecute.

Thus, by simply limiting court-martial prosecutions to special courts-martial, Congress would eliminate two of the major concerns of the *Reid* Court, and avoid those constitutional arguments. There cannot be a constitutional prohibition on court-martial jurisdiction based on the lack of procedural safeguards at the court-martial that the defendant would not be entitled to in a civilian court.

### C. MILITARY JUDGES

The final possible impediment to extending special court-martial jurisdiction to overseas DoD civilians is the fact that military judges do not have tenure in office or even a fixed term. However, recent Supreme Court decisions seem to indicate that the nature of the military judges' appointment will not be constitutional impediment to court-martial jurisdiction either.

In 1950, at the time of the *Reid* decision, military courts-martial did not have judges at all. The senior officer on the panel was the president of the court, and also made the judicial rulings for the court. That changed with the passage of the Military Justice Act of 1968, which created the position of the military judge.<sup>376</sup>

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limiting the jurisdiction of the court-martial would certainly satisfy the criteria of the *Lewis* Court. Additionally, this situation will only occur if the crime is one that would have a significantly higher penalty if tried in a different forum. It is difficult to imagine a defendant complaining that the maximum penalty is capped at only six months confinement and that the offense is deemed petty even if there is not the right to a jury trial.

<sup>376</sup> 10 U.S.C. XXXX

The military judges are commissioned officers and members of the bar of a federal court or the highest court of a State.<sup>377</sup> They are appointed as Article I judges and do not have life tenure. However, the Supreme Court has held that the Constitution does not require life tenure for Article I judges.<sup>378</sup> The Supreme Court has also held that trial by a non-tenured Article I judge does not violate an accused's due process rights.<sup>379</sup>

More recently, the court took up the issue of the appointment of military judges in *Weiss v. United States*.<sup>380</sup> The decision of the court focused whether a separate appointment by the President was required for the office of military judge, with the conclusion that a separate appointment was not necessary.<sup>381</sup> The court also reached the issue of whether the lack of a fixed term of office for military judges deprived an accused of any Due Process rights. In that regard, the court held that the combination of the historical backdrop where military judges have never had tenure, combined with the protections against command influence were sufficient to protect the Due Process interests of a military accused.<sup>382</sup>

The question remains as to whether the court's analysis would apply to court-martial jurisdiction over civilians as well as military members.<sup>383</sup> There are very good reasons to believe that it would. The *Lewis* court gave Congress a lot deference in its review of military judges the court-martial because of Congress' constitutional power

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<sup>377</sup> Art. 26 UCMJ, 10 U.S.C. § 826.

<sup>378</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

<sup>379</sup> *Palmore v. United States*, 411 U.S. 389, 410 (1973).

<sup>380</sup> 510 U.S. 163 (1994).

<sup>381</sup> The court held that there was not a need for a separate appointment to the office of military judge. This portion of the opinion would appear to apply equally whether the accused was a military member or a civilian.

<sup>382</sup> *Weiss*, 510 U.S. at 178.

<sup>383</sup> Much of the court's decision in this regard was based on the Constitutional power of Congress to regulate the Armed Forces. *Weiss*, 510 U.S. at 177.

over the military. The court would not give the same deference to a military judge's role in the court-martial of a civilian; however, the *Lewis* court's analysis indicates that a court-martial of a civilian would likely stand up to scrutiny as well.

The overall concern is whether the military judges, because they do not have tenure, would somehow be biased against civilian defendants. The *Lewis* court recognized that a fixed term of office is not an end to itself, but rather is a means to ensure judicial impartiality.<sup>384</sup> Impartiality is essential because "a fair trial in a fair tribunal is a basic requirement of due process."<sup>385</sup> The *Lewis* court analyzed the protections that the accused enjoys against any outside pressure on the military judges in a court-martial, including the military judges' immunity from command influence and the review by superior courts. The court found that military judges have are protected from outside influence and that there are not grounds for concern about bias.

The ultimate question then becomes whether it is somehow unfair for a civilian to be tried for a petty offense by a military judge who does not have a fixed term or tenure. The *Lewis* court went through a lengthy analysis describing the structural protections to ensure the independence of the military judges, even though there was not a need to develop the judicial impartiality.<sup>386</sup> Justice Scalia, in his concurrence, opined that the historical practice of the assignment of military judges would have been sufficient to affirm the conviction and that the majority's analysis of the independence of military judges was unnecessary.<sup>387</sup> The majority's additional analysis finding that military

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<sup>384</sup> *Weiss*, 510 U.S. at 179.

<sup>385</sup> *Id.* at 177, quoting *In re Murchison*, 349 U.S. 133 (1955).

<sup>386</sup> The plaintiffs had not pled actual bias on the part of the military judges and thus actual bias was not even an issue before the court. *Id.*

<sup>387</sup> *Id.* at 198.

judges are fully independent seems to suggest the court would not find a due process violation with a military judge conducting a limited court-martial for civilians.

The Supreme Court has held that “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>388</sup> The process that is due to any defendant is flexible, and the procedural protections can vary with the demands of the particular situation.<sup>389</sup> The court will perform a balancing test for due process arguments, comparing the governmental and private interests that are affected.<sup>390</sup> The court will generally look at three factors when balancing those considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>391</sup>

The court's analysis in *Weiss* indicates that there would not be a due process violation by trying overseas DoD civilians in a limited court-martial. The defendants in *Weiss* could not even allege that the military judges in their cases “were or appeared to be biased”.<sup>392</sup> Rather, they were limited to asserting a private interest in having an independent judiciary.<sup>393</sup> In the absence of judicial misconduct, a civilian defendant would be in the same situation. The only private interest that they could argue would be an alleged structural deficiency by not having tenured judges.

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<sup>388</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

<sup>389</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>390</sup> *Cafeteria Workers v. McElroy*, 367 U.S. at 895.

<sup>391</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>392</sup> *Weiss* 510 U.S. at 178.

<sup>393</sup> *Id.*

Trial by a limited court-martial with a non-tenured judge would not comport with a right to have a tenured judge, assuming such a right exists. It would, however, be difficult for a defendant to argue convincingly for the probable value of any additional safeguards by having a tenured judge. Just as in *Weiss*, they would be left to argue some sort of abstract additional judicial independence for tenured judges. This is where the *Weiss* analysis becomes very important. None of the justices found that tenure would have increased the independence of the military judges at all.<sup>394</sup> Justice Ginsberg's concurring opinion seems to indicate that to her mind the military member receives the same constitutional protection to which any other citizen is entitled.<sup>395</sup>

The final step in the test is to identify and balance the government's interests against the defendant's. The government would lose the deference given to Congress in regulating the military when the court-martial is of a civilian. The government would also lose the historical backdrop of non-tenured judges in regard to civilian prosecutions.<sup>396</sup> However, the government would retain virtually all of its interests in maintaining good order and discipline and international relations that demonstrated the need for the MEJA.<sup>397</sup>

These interests would be tempered somewhat by the availability of a MEJA prosecution, and the fact that the more serious offenses would likely be tried in that forum. Thus, only the less severe offenses and the corresponding governmental interests would be balanced for a limited court-martial. The private interests of the defendant,

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<sup>394</sup> The *Weiss* decision was unanimous in this regard.

<sup>395</sup> *Weiss*, 510 U.S. at 195, (Ginsberg, J. concurring). "A member of the Armed Forces is entitled to equal justice under law not a conceived by the generosity of a commander, but as written in the Constitution...". (citations omitted).

<sup>396</sup> "[A] fixed term of office is a traditional component of the Anglo-American civilian tradition...". *Id.* at 178.

however, would likely be smaller as well. Once again, the fact that Congress limited the sentences to six months of confinement or less would be considered a determination that these constituted petty offenses.<sup>398</sup> With that determination comes a reduction in the rights to which a defendant is entitled, which include the loss of the right to a grand jury investigation and a jury trial.<sup>399</sup> Justice Scalia made this point by implication by stating in his concurrence in *Weiss*, "But no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive."<sup>400</sup> He does not indicate that non-tenured military judges would be inappropriate for petty offenses.

Not all offenses tried by a limited court-martial would be what are traditionally classified as petty offenses. Consider a hypothetical case where a civilian spouse stabs her active duty husband with a kitchen knife.<sup>401</sup> The host nation waives its jurisdiction to prosecute, as does the U.S. attorney under the MEJA. The case is then tried as a limited court-martial for aggravated assault.<sup>402</sup> The defendant then appeals the conviction, arguing that she did not receive due process for a serious offense.<sup>403</sup> Under the Supreme Court's three-part due process test, her first contention would have to be that she has some sort of interest in being tried in a forum that would have provided her with a grand jury and a jury trial. This may be possible, although it is difficult to really view her rights

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<sup>397</sup> See *supra* note 31 and accompanying text.

<sup>398</sup> See *supra* note 373 and accompanying text.

<sup>399</sup> See *supra* note 370 and accompanying text.

<sup>400</sup> *Weiss*, 510 U.S. at 198, (Scalia, J. concurring in part and concurring in the judgment) (emphasis added).

<sup>401</sup> This hypothetical is taken from an actual case reported by the DoD IG in their report. DoD IG Report, *supra* note 60 at 9.

<sup>402</sup> The federal offense of assault with a deadly weapon carries a maximum punishment of 10 years of imprisonment. 18 U.S.C. § 113.



as being prejudiced by being tried in a forum with a maximum possible confinement of six months as opposed to one that could sentence her to ten years.<sup>404</sup> Her bigger problem will be winning the third part of the due process test, balancing her interests against the government's. That is because two of the three branches of the government have already weighed in on this issue, and decided that hers was not a serious offense. The legislative branch made that determination by authorizing limited court-martial jurisdiction for this type of situation. The executive branch will also have looked at her case specifically and determined that it did not merit a full MEJA prosecution. With both the legislative and executive branches determination that this was not a serious offense, it is unlikely that whatever possible prejudice she suffered by being tried by a court of limited jurisdiction would outweigh the governmental interest in prosecuting her in a court-martial.

One additional consideration in extending limited court-martial jurisdiction will be to address what can best be described as the involuntary gag reflex that many people experience when idea of civilians being tried by military courts comes to mind. This reaction is partially due to the historical perception of military justice as being unfair. It also stems from the fact that there are many military specific offenses of which most civilians are not aware, and that seem obscure if not draconian.

The obscurity of the military system could be remedied to a large extent by instituting an education program for DoD civilians similar to that of the MEJA. The MEJA requires regulations that will educate individuals subject to the MEJA's

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<sup>403</sup> The conviction would indicate that she had been convicted of aggravated assault, a very serious sounding offense, despite the fact that it was tried as a special court-martial with a maximum of six months of confinement.

<sup>404</sup> Her argument would have to be that she was really innocent, and either a grand jury would not have returned an indictment against her, or she would have been acquitted by a jury. In essence, this argument boils down to factual insufficiency which is rarely successful on appeal.

jurisdiction of the operation of that law.<sup>405</sup> The same could be done regarding court-martial jurisdiction. Ensuring that the civilians are aware of the law and its requirements will go a long way toward eliminating the obscure nature of military law.

The perceptions of the fairness of the military justice system stem from the historical nature of military justice.<sup>406</sup> Giving civilians the same protections afforded military members in a special court-martial can alleviate this perception. The most significant of these protections is the provision of government appointed defense counsel regardless of the defendant's ability to pay.<sup>407</sup> Another unique protection is the right to a trial by members for offenses that would be tried by a judge alone in the civilian system.<sup>408</sup> A final protection is the fact that the commander will retain the administrative options for punishment, and thus a court-martial is not a foregone conclusion, but only one of the options available to address an offense.<sup>409</sup>

Re-introducing limited court-martial jurisdiction to overseas DoD civilians has several advantages in closing the jurisdictional gap. The first and most obvious advantage is the fact that it will allow less severe offenses to be prosecuted. The court-martial will be significantly faster and more efficient than prosecutions under the MEJA because it is an established court in the overseas jurisdiction. This means that many of the less severe offenses that still have a large impact on good order and discipline or international relations can be dealt with immediately and directly.<sup>410</sup>

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<sup>405</sup> 18 U.S.C. § 3266(b)(1).

<sup>406</sup> Cite to Supreme court case bashing the military

<sup>407</sup> cite to where right to defense counsel comes from.

<sup>408</sup> cite to where right to members comes from.

<sup>409</sup> See *supra* notes 57-59 and accompanying text describing the commander's administrative options.

<sup>410</sup> Consider the case of a dependent who habitually shoplifts on base. The military commander currently has two options. The first is to transfer the family out of the area. This means that the military member's tour will be cut short, and can affect the member's entire work area if a

A second advantage is that the decision to prosecute will be made by the local military commander, who is the person best able to judge the effect of the offense on good order and international relations. It will allow the U.S. attorney to prosecute the cases that merit a full MEJA prosecution, but will allow the military commander to make a judgment call for cases where the U.S. attorney declines a MEJA prosecution. If there is concern about the commander having too much discretion in making this decision, regulations could require additional approval before a civilian is court-martialed. Regulations currently require Secretarial approval before a retiree or reservist is called to active duty to face a court-martial.<sup>411</sup> A similar requirement could be established for court-martials of civilians.

In any event, extending special court-martial jurisdiction to overseas DoD civilians would fully close the jurisdictional gap. By limiting the jurisdiction of the court-martial to that of a special court, the constitutional defects of full court-martial jurisdiction addressed by *Reid* will be avoided. It will also give the local commander the ability to deal with minor offenses that can have large consequences.

## VII. CONCLUSION

The need for jurisdiction over DoD civilians stationed overseas continues to increase. With more civilians living overseas with the military, the need for jurisdiction over their actions has been pronounced. This need was aptly demonstrated by the *Gatlin* case.

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replacement is not readily available. It also involves the governmental expense of an additional move for the military family. The second option is to bar the dependent from the base. This option places a habitual offender into the host nation's community.

<sup>411</sup> Cite to REg

The MEJA is a good first step to end the forty-year drought of jurisdiction over offenses committed by DoD civilians overseas. It will greatly enhance the ability of overseas military commanders to enforce good order and discipline in the overseas environment. It will also improve relations with the host nations, because the host nations will no longer be responsible for dealing with the problems that these civilians can cause when they engage in criminal behavior. The MEJA has several issues that will have to be addressed to make it as effective as possible. The most significant of which is to find a way to make potential death penalty cases under the MEJA compatible with the host nation's human rights obligations.

However, the MEJA is simply not designed to prosecute many of the smaller violations that can cause significant problems for the overseas military forces. Extending limited court-martial jurisdiction to overseas DoD civilians will fully close the jurisdictional gap and address all of the concerns that motivated the implementation of the MEJA.